

# **CUSTOMS BULLETIN AND DECISIONS**

**Weekly Compilation of  
Decisions, Rulings, Regulations, Notices, and Abstracts  
Concerning Customs and Related Matters of the  
U.S. Customs Service  
U.S. Court of Appeals for the Federal Circuit  
and  
U.S. Court of International Trade**

**VOL. 34**

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**NO. 8**

*This issue contains:*

U.S. Customs Service

General Notices

U.S. Court of International Trade

Slip Op. 00-8 Through 00-11

Abstracted Decisions:

Classification: C00/1 Through C00/4

Valuation: V00/1

## NOTICE

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# U.S. Customs Service

## *General Notices*

### CONCLUSION OF THE NATIONAL CUSTOMS AUTOMATION PROGRAM PROTOTYPE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document announces Customs conclusion of the National Customs Automation Program Prototype (NCAP/P). Prototype operations must be discontinued due to the cessation of funding for the NCAP/P automated system. Upon prototype conclusion, NCAP/P participants must cease entering goods and transmitting data under NCAP/P procedures. This document also provides instructions to participants on procedures for processing prototype entries using non-NCAP/P systems.

DATE: Termination of the NCAP/P will be effective as of March 13, 2000. No new applications for participation will be accepted as of February 10, 2000.

FOR FURTHER INFORMATION CONTACT: Comments and requests regarding NCAP/P termination may be directed to Keith Fleming, U.S. Customs Service at (202) 927-1049, or Virginia Noordewier, U.S. Customs Service at (202) 927-3296.

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

The vision of the Automated Commercial Environment (ACE) is to establish a Trade Compliance Process that achieves high levels of compliance and reduces the cycle time required for imports to clear Customs. NCAP/P is the prototype for the first implementation of this automated process.

Customs first announced its intention to implement the NCAP/P in the Federal Register on March 27, 1997 (62 FR 14731); the test was modified with updated procedures in a notice published in the Federal Register on August 21, 1998 (63 FR 44949) which replaced the previous notice. Customs also published a notice in the Federal Register on October 15, 1998 (63 FR 55426), announcing the proposed expansion of the prototype to five additional ports of entry.

The NCAP/P plan called for a four-stage implementation of new cargo processing features over a period of up to three years. The NCAP/P commenced on April 27, 1998 with the implementation of the cargo release stage. Customs implemented the second stage on October 13, 1998, which provided for cargo release with examination. At the time of this termination, the third and forth stages—entry summary/periodic payment and reconciliation—have not been implemented.

#### PROCEDURES

Upon prototype conclusion, participants must immediately revert to non-NCAP/P processing for all cargo shipments.

A. As of the date 30 days from the date of publication of this document in the Federal Register, cargo release must be obtained through existing non-NCAP/P systems or procedures.

B. Cargo releases previously obtained through NCAP/P must be followed up by summary data and payments transmitted through existing non-NCAP/P system, e.g., the Automated Commercial System.

#### PROTOTYPE EVALUATION

Upon the conclusion of the NCAP/P, an evaluation of the entire test will be conducted and the results published in the Federal Register and the CUSTOMS BULLETIN.

Dated: February 4, 2000.

CHARLES W. WINWOOD,  
*Assistant Commissioner,  
Office of Field Operations.*

[Published in the Federal Register, February 10, 2000 (65 FR 6688)]

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### SOLICITATION OF APPLICATIONS FOR MEMBERSHIP ON CUSTOMS COBRA FEES ADVISORY COMMITTEE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice establishes criteria and procedures for the selection of members and requests applications for membership on the Customs COBRA Fees Advisory Committee.

DATE: Applications will be accepted until March 9, 2000.

ADDRESS: Applications should be addressed to Richard Coleman, Trade Compliance Team, United States Customs Service, 1300 Pennsylvania Avenue NW, Room 5.2, Washington, D.C. 20229, Attention: COBRA 1999.

FOR FURTHER INFORMATION CONTACT: Richard Coleman, Trade Compliance Team, U.S. Customs Service, 202-927-0563.

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

By enactment of Pub. L. 106-36, the Miscellaneous Trade and Technical Corrections Act of 1999, section 13031 of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (19 U.S.C. 58c) was amended by adding language which directs the Commissioner of Customs to establish an advisory committee (the Customs COBRA Fees Advisory Committee) whose membership shall consist of representatives from the airline, cruise ship and other transportation industries who may be the subject of fees under section 13031.

The Committee will advise the Commissioner of Customs on issues related to the performance of inspectional services of the United States Customs Service. Such advice shall include, but not be limited to, such issues as the time periods during which such services should be performed, the proper number and deployment of inspectional officers, the level of fees and the appropriateness of any proposed fee.

The Committee will consist of eight industry members and one U.S. Customs representative. The Deputy Commissioner of the U.S. Customs Service will be the Customs representative and chair the Committee. Two senior managers representing the Office of Finance and the Office of Field Operations of the U.S. Customs Service will serve as technical representatives to the chairperson. The Committee shall be in existence unless, or until, such time as its establishment is repealed by Congress.

The members shall be selected by the Commissioner of Customs from applicants representing the transportation industry served by Customs, such as but not limited to, the following: commercial cargo vessels, commercial passenger vessels, rail transportation, trucking transportation, air passenger, barge operators and general aviation.

The members must demonstrate professional or personal qualifications relevant to the purpose, functions and tasks of the Committee. Appointments will be made with the objective of creating a diverse and balanced body with a variety of interests, backgrounds and viewpoints represented. In addition, the members shall represent as much as possible all geographical regions of the country. Persons who serve on another advisory committee will not be eligible to serve on this Committee.

The Deputy Commissioner may designate another official to serve in his absence as Acting Chairperson for purposes of presiding over a meeting of the Committee or performing any other duty of the chairperson. Not more than four meetings will be held during a two year period, in accordance with the Federal Advisory Committee Act. Regular meetings will be held at six month intervals. An occasional special meeting may be held at the discretion of the chairperson and the members. Meetings will generally be held at the U.S. Customs Service headquarters in

Washington, D.C. On occasion, meetings may be held outside of Customs Headquarters, generally at a Customs port.

The meetings are open to public observers, including the press, unless special procedures have been followed to close a meeting to the public. The Committee may elect to receive oral or written presentations by parties not directly represented by a member of the Committee where such presentations would contribute to committee deliberations.

No person who is required to register under the Foreign Agents Registration Act as an agent or representative of a foreign principal may serve on the advisory committee. Members shall not be paid compensation, nor shall they be considered federal government employees for any reason. No per diem, transportation or other expenses will be reimbursed for the cost of attending committee meetings at any location.

Membership on the Committee is personal to the appointees. Regular attendance is essential to the effective operation of the Committee. Members are selected based on their individual credentials and qualifications. Members may not designate alternates to represent them at Committee meetings. In the event of an unavoidable absence of a member, even if the meeting is closed to the public, a representative of the member's organization may attend the session as a nonparticipating observer.

Initially, four members will be appointed for a term of twelve months and four members will be appointed for a term of twenty four months. Thereafter members will serve for a period of twenty four months. Members who served on the Committee during a prior two year term or terms are eligible to reapply for membership. However, it is expected that approximately half of the seats on the Committee will be filled with new members.

Any interested person wishing to serve on the Customs COBRA Fees Advisory Committee must provide the following: a statement of interest and reasons for application and a complete professional biography or resume. In addition, applicants must state in their applications that they agree to submit to preappointment security and tax checks. There is no prescribed format for the application. Applicants may send a cover letter describing their interest and qualifications, along with a resume.

Dated: February 2, 2000.

RAYMOND W. KELLY,  
*Commissioner of Customs.*

[Published in the Federal Register, February 8, 2000 (65 FR 6254)]

DEPARTMENT OF THE TREASURY,  
OFFICE OF THE COMMISSIONER OF CUSTOMS,  
*Washington, DC, February 9, 2000.*

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,  
*Assistant Commissioner,  
Office of Regulations and Rulings.*

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PROPOSED REVOCATION OF RULING LETTER AND  
TREATMENT RELATING TO THE CLASSIFICATION OF MEN'S  
WOVEN GARMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of classification ruling letter and treatment relating to the classification of certain men's woven garments.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of certain men's woven garments and revoke any treatment previously accorded by Customs to substantially identical merchandise. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before March 24, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Textile Classification Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 927-2394.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of certain men's woven garments. Although in this notice Customs is specifically referring to one ruling, Houston Ruling Letter (HQ) 804530, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of the final decision of this notice.

In HQ 804530, dated December 9, 1994, the classification of three styles of men's woven garments were determined to be in heading 6211, HTSUS. This ruling letter is set forth in "Attachment A" to this document. Since the issuance of this ruling, Customs has had a chance to re-

view the classification of this merchandise and has determined that the classification is in error.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke HQ 804530, and any other rulings not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 963354 (see "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: December 8, 1999.

JOHN E. ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachments]

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[ATTACHMENT A]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Houston, TX, December 9, 1994.  
CLA-2-62:355:107:H:CO:CI EA  
Category: Classification  
Tariff No. 6211.11.1010

MR. GEORGE HEILIGMAN  
PROTRADE IMPORT & EXPORT CO.  
3843 W. 11th Avenue  
P.O. Box 21345  
Eugene, OR 97402

Re: The tariff classification of men's swimwear of woven man-made fibers from China.

DEAR MR. HEILIGMAN:

In your letter dated November 23, 1994, you requested a classification ruling.

Style A is a pair of men's woven 100% polyester swim shorts with a knit 100% polyester liner; an elasticized waistband; a mini hip pocket with hook and loop fastener; and short flared leg openings with side slits. Style B is a pair of men's woven 100% nylon swim shorts with a knit 100% polyester liner; an elasticized waistband; a small hip pocket with hook and loop fastener; and hemmed leg openings with side vents. Style C is a pair of men's woven 100% nylon swim shorts with a knit 100% polyester liner; an elasticized waistband with drawcord; front pockets and a hip pocket; and hemmed leg openings.

The applicable subheading for styles A, B and C will be 6211.11.1010, Harmonized Tariff Schedule of the United States (HTS), which provides for track suits, ski suits and swimwear; other garments: swimwear: men's or boys': of man-made fibers, men's. The duty rate will be 29.6 percent ad valorem.

The swimwear falls within textile category designation 659. As a product of China, this merchandise is subject to visa and quota requirements based upon international textile trade agreements.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part cate-

gories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restaint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

PATRICIA MCCAULEY,  
District Director.

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[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
Washington, DC.

CLA-2 RR:CR:TE 963354 jb  
Category: Classification  
Tariff No. 6204.63.3532

MR. GEORGE HEILIGMAN  
PROTRADE IMPORT & EXPORT CO.  
3843 W. 11<sup>th</sup> Avenue  
Eugene, OR 97402

Re: Revocation of HQ 804530; men's woven shorts; not swimwear.

DEAR MR. HEILIGMAN:

On December 9, 1994, our Houston office issued to you, Houston Ruling Letter (HO) 804530, classifying certain "men's woven shorts" in heading 6211, Harmonized Tariff Schedule of the United States (HTSUS), as men's swimwear. This letter is to inform you that pursuant to a review of that ruling, we believe classification of that merchandise in heading 6211, HTSUS, is in error. Accordingly, that ruling letter is revoked pursuant to the analysis which follows below.

*Facts:*

In HQ 804530, the submitted merchandise was referred to as men's "swim shorts" and described as follows:

**Style A, style number 6880**, is a pair of men's woven 100 percent polyester swim shorts with a knit 100 percent polyester liner, an elasticized waistband, a mini hip pocket with hook and loop fasteners, and short flared leg openings with side slits;

**Style B, style number 6960**, is a pair of men's woven 100 percent nylon swim shorts with a knit 100 percent polyester liner, an elasticized waistband, a small hip pocket with hook and loop fasteners, and hemmed leg openings with side vents;

**Style C, style number 6920**, is a pair of men's woven 100 percent nylon swim shorts with a knit 100 percent polyester liner, an elasticized waistband with drawcord, front pockets, a hip pocket, and hemmed leg openings.

*Issue:*

What is the proper classification for the subject merchandise?

*Law and Analysis:*

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI will be applied, in the order of their appearance.

In *Hampco Apparel, Inc. v. United States*, Slip Op. 88-12 (January 28, 1988), the Court of International Trade stated that three factors must be present if a garment is to be considered swimwear for tariff purposes:

- (1) the garment has an elasticized waistband through which a drawstring is threaded;
- (2) the garment has an inner lining of lightweight material, and
- (3) the garment is designed and constructed for swimming.

In Headquarters Ruling Letter (HQ) 081477, dated March 21, 1988, we stated that in order to determine whether a garment is designed and constructed for swimming, we will first look at the appearance of the garment. If the appearance is inconclusive, the following evidence will be considered: the way in which the garment has been designed, manufactured, marketed or advertised, the way in which the manufacturer or importer intends the garment to be used, and the way in which a garment is chiefly used. See HQ 952751, dated January 12, 1993; HQ 952209, dated October 2, 1992; HQ 951841, dated August 11, 1992; and HQ 950501, dated December 17, 1991. As such, Customs' analysis is in fact, a two part test, that is,

- (a) examination of the physical attributes of the garment (three *Hampco* features); and
- (b) where ALL three features are not present, we then look to the design, manufacture, marketing or advertising; intended use of the garment and principal use of the garment for guidance.

Customs has been consistent in ruling that even in those instances where the first two factors enumerated by the court in *Hampco* are present, but the third factor is lacking, the article will be considered shorts (See also, HQ 086436, dated May 3, 1990; HQ 086979, dated May 15, 1990; HQ 087476, dated September 7, 1990; HQ 950207, dated December 3, 1991, and HQ 950652, dated February 12, 1992).

Upon examination of the subject garments, it would be a fair statement to say that these garments will be worn for purposes other than swimming. First, we note that the subject merchandise does not satisfy all of the criteria required by *Hampco*. Of all the styles, only style "C" features a drawstring cord; styles A and B feature an elasticized waistband without a drawcord. Additionally, all of the shorts feature some sort of small pocket(s), which we assume will serve the purpose of containing small objects, such as keys, when engaging in a sport related activity which is not exclusively the sport of swimming. Although we do not hold issue with the claim that these garments can be used as swimwear, as reflected in the marketing material submitted, these garments clearly are "transition" garments for use "in swimming and other summer related sports including but not limited to swimming, sun bathing, river rafting, and other multi-sports activities."

Albeit we do not dispute that these garments might be worn for swimming, it is our belief that such a use would be a fugitive one and would not be the use for which the garments are primarily purchased. In regard to use, the Court in *Hampco*, also stated:

The fact that a garment could have a fugitive use or uses does not take it out of the classification of its original and primary use. The primary design, construction, and function of an article will be determinative of classification, whether or not there is an incidental or subordinate function. *Trans-Atlantic Co., v. United States*, 67 Cust. Ct. 296, 299, C.D. 4288 (1971), *aff'd*, 60 CCPA 100, C.A.D. 1088, 471 F.2d 1397 (1973). \*\*\* The fact that swimwear may be used for other incidental purposes unrelated to swimming, e.g., boating, basketball, volleyball and bicycling, does not change its character as swimwear. If the garment was designed and constructed as swimwear, it shall be so classified.

The Court's remarks regarding swimwear susceptible to fugitive uses may also be said of sports shorts designed primarily for uses other than swimming, but which could be used for swimming. Such a use would be a fugitive use, as is the case here. (See also HQ 952322, dated December 17, 1992). Accordingly, it is our belief that the submitted garments are not principally designed and constructed for swimming, and that they are more appropriately classified as outerwear shorts.

We also note with interest that although these shorts were classified as "men's shorts" there is nothing in the design and construction of these garments that would indicate that they are to be worn only by men. Chapter 62, HTSUS, note 8 states, in relevant part:

Garments which cannot be identified as either men's or boys' garments or as women's or girls' garments are to be classified in the headings covering women's or girls' garments.

As such, these garments are classified in heading 6204, HTSUS, in the appropriate subheading for women's outerwear shorts.

In a recent telephone conversation with a member of my staff it was mentioned that current importations of this merchandise are identical in construction except for the placement of the pocket. Whereas the shorts once featured a pocket at the hip, they now feature an inside pocket which is sewn into the front of the shorts. Despite the change in the placement of the pocket these shorts remain properly classified in heading 6204, HTSUS, pursuant to the analysis which is set forth above.

*Holding:*

Styles "A" (style number 6880), "B" (style number 6960), and "C" (style number 6920) are classified under subheading 6204.63.3532, HTSUSA, which provides for, women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear); trousers, bib and brace overalls, breeches and shorts: of synthetic fibers: other: other: other: other: shorts: women's. The applicable general column one rate of duty is 29.5 percent *ad valorem* and the quota category is 648.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,  
Director,  
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER AND  
REVOCATION OF TREATMENT RELATING TO TARIFF  
CLASSIFICATION OF FABRIC SOFTENER AND FLOOR SOAP

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of a tariff classification ruling letter and the revocation of treatment relating to the classification of fabric softener and floor soap.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling, and revoke any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of a fabric softener and a floor soap under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before March 24, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulation and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Norman W. King, General Classification Branch (202) 927-1109.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported

merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of two products, a fabric softener and a floor soap. Although in this notice Customs is specifically referring to one ruling, New York Ruling Letter (NYRL) A86342, dated December 27, 1996, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. No further rulings have been found. This notice will cover any rulings on the merchandise, which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

NYRL A86342 is set forth as "Attachment A" to this document, in which we held that five products, a fabric softener, a floor soap, a liquid laundry wash, a wool wash, and a dishwashing liquid, were all classified in subheading 3402.20.5000, HTSUS. We are now of the opinion, that the fabric softener is classified in subheading 3809.91.00, HTSUS, and that the floor soap is classified in subheading 3401.20.00, HTSUS.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to modify NYRL A86342 and revoke any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 963622 (see "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before tak-

ing this action, consideration will be given to any written comments timely received.

Dated: February 3, 2000.

MARVIN AMERNICK,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachments]

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[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
New York, NY, December 27, 1996.  
CLA-2-34:RR:NC:2:236 A86342  
Category: Classification  
Tariff No. 3402.20.5000

MS. SANDRA L. HAUPT  
SR. MANAGEMENT CONSULTANT  
TOWER GROUP INTERNATIONAL  
128 Dearborn Street  
Buffalo, NY 14207-3198

Re: The tariff classification of Liquid Laundry Wash (32oz), Floor Soap (32oz), Wool Wash (32oz), Dishwashing Liquid (32oz) and Fabric Softener (32oz) from Belgium.

DEAR MS. HAUPT:

In your letter dated July 31, 1996, on behalf of your client Ecover, Inc., you requested a tariff classification ruling.

The applicable subheading for the Liquid Laundry Wash (32oz), Floor Soap (32oz), Wool Wash (32oz), Dishwashing Liquid (32oz) and Fabric Softener (32oz) will be 3402.20.5000, Harmonized Tariff Schedule of the United States, which provides for organic surface-active agents (other than soap); surface-active preparations, washing preparations (including auxiliary washing preparations) and cleaning preparations, whether or not containing soap, other than those of heading 3401: \* \* \* Preparations put up for retail sale: Other. The rate of duty will be Free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist V. Gualario at 212-466-5744.

ROGER J. SILVESTRI,  
Director,  
National Commodity Specialist Division.

## [ATTACHMENT B]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
Washington, DC.  
CLA-2 RR:CR:GC 963622K  
Category: Classification  
Tariff No. 3809.91.0000 and 3401.20.0000

Ms. SANDRA L. HAUPT  
SR. MANAGEMENT CONSULTANT  
TOWER GROUP INTERNATIONAL  
128 Dearborn Street  
Buffalo, NY 14207-3198

Re: Modification of New York Ruling Letter (NYRL) A86342 Dated December 27, 1996;  
Fabric Softener; Floor Soap.

DEAR Ms. HAUPT:

In response to your letter dated July, 31, 1996, on behalf of Ecover, Inc., Customs issued NYRL A86342, concerning the classification of several products, two of which were described as a fabric softener (050A0) and a floor soap (0601A0). These two products were classified as organic surface-active agents (other than soap); surface-active preparations, washing preparations (including auxiliary washing preparations) and cleaning preparations, whether or not containing soap, other than those of heading 3401; other, in subheading 3402.20.5000, Harmonized Tariff Schedule of the United States (HTSUS), with a free general rate of duty. NYRL A86342 no longer represents the views of Customs for these two products. Our position follows.

*Facts:*

The fabric softener (050A0), put up for retail trade in 32-ounce containers, consists of water and various ingredients including fragrance but it does not contain a surface-active agent.

The floor soap (0601A0), put up in liquid form in 32-ounce containers, consists of linseed oil soap and fragrance.

*Issue:*

What is the proper classification of the fabric softener and the floor soap?

*Law and Analysis:*

The classification of imported merchandise under the HTSUS is governed by the principles set forth in the General Rules of Interpretation (GRI). GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section and chapter notes and, unless otherwise required, according to the remaining GRI's, taken in their appropriate order. Accordingly, we first have to determine whether the articles are classified under GRI 1.

In your letter dated July 31, 1999, you noted that the liquid fabric softener, (050A0) did not contain an organic surface-active agent and Customs Laboratory Report 2-96-30573-001, dated October 11, 1996, does not indicate that the product contains a surface-active agent. Therefore, the product is not classified by virtue of GRI 1 in subheading 3402.20.5000, HTSUS.

Heading 3809, HTSUS, provides for finishing agents, dye carriers to accelerate the dyeing or fixing of dyestuffs and other products and preparations (for example, dressings and mordants), of a kind used in the textile, paper, leather or like industries, not elsewhere specified or included. Subheading 3809.91.00, HTSUS, provides for a kind used in the textile or like industries. The Explanatory Notes (EN's) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and General Rules of Interpretation of the HTSUS. The EN's for heading 3809, indicate that it covers a wide range of products and preparations of a kind generally used during the processing or finishing such products as fabrics and includes softening agents as an example of preparations to modify the feel of products. Accordingly, the liquid fabric softener is classified by virtue of GRI 1 in subheading 3809.91.00, HTSUS.

In your letter, you also questioned whether the floor soap could be classified as soap since it is in liquid form and not bars or cakes. Heading 3401 provides for soap; organic surface-

active products and preparations for use as soap, in the form of bars, cakes, molded pieces or shapes, whether or not containing soap; paper, wadding, felt and nonwovens, impregnated, coated or covered with soap or detergent. The heading specifically provides for "soap". The EN's for heading 3401 states that there are three categories of soap, and describes hard, soft, and liquid soaps that are classified as soaps in the heading. Unlike organic surface-active products and preparations for use as soap, soaps are not required to be in the form of bars, cakes, moulded pieces or shapes. The floor soap in liquid form is classified by virtue of GRI 1 as soap, in subheading 3401.20.00, HTSUS.

*Holding:*

A fabric softener as described in NYRL A86342 and identified as 050A0, is classified as a finishing agent not elsewhere specified or included, of a kind used in the textile or like industries, in subheading 3809.91.00, HTSUS.

Floor soap in liquid forms as described in NYRL A86342, and identified as 0601A0, is classified as soap, in subheading 3401.20.00, HTSUS.

NYRL A86342 is modified accordingly.

JOHN DURANT,

*Director,*

*Commercial Rulings Division.*

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## REVOCATION OF RULING LETTER AND TREATMENT RELATING TO CLASSIFICATION OF ACEROLA EXTRACT POWDER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of classification ruling letter and treatment relating to the classification of acerola extract powder.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of acerola extract powder and any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed revocation was published in the CUSTOMS BULLETIN of December 29, 1999, Vol. 33, No. 52. One comment was received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after April 24, 2000.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, General Classification Branch, 202-927-1396.

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on December 29, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 52, proposing to revoke NYRL 865903, dated November 5, 1991, pertaining to the tariff classification of acerola extract powder. One comment was received in reply to the notice.

As stated in the proposal notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised the Customs Service during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this notice.

In NY 865903, dated November 5, 1991, the classification of a product commonly referred to as acerola extract powder was determined to be in heading 3003.90.0000, HTSUS, which provides for medicaments for therapeutic or prophylactic purposes, not put up in measured doses or

in forms or packings for retail sale. Since the issuance of that ruling, Customs has had a chance to review the classification of this merchandise and has determined that classification is in error and that the product is properly classified in subheading 2106.90.9998, HTSUS, which provides for food preparations, not elsewhere specified or included, \* \* \* other.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY 865903, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 962686 (see "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

Dated: February 4, 2000.

MARVIN AMERNICK,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachment]

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[ATTACHMENT]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
Washington, DC, February 4, 2000.

CLA-2 RR:CR:GC 962686ptl  
Category: Classification  
Tariff No. 2106.90.9998

MS. STELLA F. ALBER  
AMERICAN OVERSEAS AIR FREIGHT, INC.  
11034 South La Cienega Boulevard  
Inglewood, CA 90304-1198

Re: Acerola Extract Powder Type 1000; NY 865903 revoked.

DEAR MS. ALBER:

In New York Ruling Letter (NY) 865903, issued to you on November 5, 1991, on behalf of Weinstein Chemicals, Inc., Customs ruled that Acerola extract powder, type 1000, treated with maltodextrin which functions as an anticaking agent, containing 17-19 percent Vitamin C, which is imported in bulk form to be used in the manufacture of Vitamin C preparations, was classified in subheading 3003.90.0000, Harmonized Tariff Schedule of the United States (HTSUS). This provision provides for "Medicaments (excluding goods of 3002, 3005, or 3006) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale."

Customs has reviewed this ruling and determined that this classification is incorrect. Therefore, this ruling revokes NY 865903 and sets forth the correct classification of acerola extract powder.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of NY 865903 was published on December 29, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 52. One comment was received in response to the notice.

*Facts:*

Acerola extract powder is produced from the juice of Acerola cherries. The extract is produced by vacuum drying the juice which has been treated with maltodextrin to prevent caking. You state that the extract contains 17-19 percent Vitamin C.

In your ruling request, you suggested that the product be classified in heading 2936, HTSUS, which provides for provitamins and vitamins, natural or reproduced by synthesis.

*Issue:*

What is the classification of Acerola extract powder, type 1000, containing an anticaking agent, imported in bulk form?

*Law and Analysis:*

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings under consideration are as follows:

<b>2009</b>	Fruit juices (including grape must) and vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter:
* * * * *	
2009.80	Juice of any other single fruit or vegetable:
2009.80.60	Other.
2009.80.6010	Cherry juice.
<b>2106</b>	Food preparations not elsewhere specified or included:
2106.90	Other:
	Other
	Other
	Other
	Other
	Other
2106.90.9998	Other.
<b>2936</b>	Provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent:
* * * * *	
	Vitamins and their derivatives, unmixed:
2936.27.0000	Vitamin C (Ascorbic acid) and its derivatives.
* * * * *	
2936.90.0000	Other, including natural concentrates.
<b>3003</b>	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale:
* * * * *	
3003.90.0000	Other.

In your initial classification request, you proposed that the goods be classified in subheading 2936.27.0000, HTSUS, which provides for vitamin C and its derivatives. As stated above, we must refer to chapter notes when classifying goods. Chapter note 1(a) to Chapter 29 states that the headings of that chapter apply only to "separate chemically defined organic compounds." The Acerola extract powder is the dried concentrated juice of the fruit.

Although it is high in Vitamin C, the product is not a "separate, chemically defined organic compound" vitamin described by the chapter note. Therefore, the product cannot be classified in subheading 2936.27.0000, HTSUS.

For the same reason, the product is not eligible for classification in subheading 2936.90 which covers natural concentrates of vitamins. The products covered by this subheading have been isolated from their source by one or more chemical or physical processes and the resulting product is an isolated substance. The Acerola extract powder is the dried juice of the Acerola cherry and not the pure vitamin.

The comment received voiced the opinion that Customs was interpreting the language of the ENs "too narrowly" when discussing vitamin purity. We disagree. Both the Chapter notes and the ENs refer to concentrates which have been isolated from their (vegetable or animal) sources by one or more chemical or physical methods such as distillation, saponification, crystallization, acylation, etc. to form the desired products. The Acerola extract powder is not a true extract or vitamin concentrate, but rather a spray-dried juice to which maltodextrin has been added. As such, heading 2936 is inappropriate.

NY 865093 classified the goods in subheading 3003.90.0000, HTSUS. However, the ENs to heading 3003, HTSUS, state, in part, that "This heading covers medicinal preparations for use in the internal or external treatment or prevention of human or animal ailments. These preparations are obtained by mixing together two or more substances." While it is not disputed that the product contains a significant amount of Vitamin C, and you state that it is to be used in the manufacture of vitamins, the product is not formulated for the treatment of any medical condition. In its imported condition, the product is not intended for therapeutic or prophylactic uses. Consequently, it cannot be classified in heading 3003, HTSUS.

Although fruit juices may be concentrated or in powder form and still be classified in heading 2009, HTSUS, there are strict limitations on the types of substances which may be added to the juice.

The ENs to chapter 20 indicate the types of substances which may be added to juices of heading 2009:

The juices of this heading may be concentrated (whether or not frozen) or in the form of crystals or powder provided, in the latter case, that they are entirely or almost entirely soluble in water. Such products are usually obtained by processes involving either heat (whether or not in a vacuum) or cold (lyophilisation).

Provided they retain their original character, the fruit or vegetable juices of this heading may contain substances of the kinds listed below, whether these result from the manufacturing process or have been added separately:

(1) Sugar.

(2) Other sweetening agents, natural or synthetic, provided that the quantity added does not exceed that necessary for normal sweetening purposes and that the juices otherwise qualify for this heading, in particular as regards the balance of the different constituents (see Item (4) below).

(3) Products added to preserve the juice or to prevent fermentation (e.g., sulphur dioxide, carbon dioxide, enzymes).

(4) Standardising agents (e.g., citric acid, tartaric acid) and products added to restore constituents destroyed or damaged during the manufacturing process (e.g., vitamins, colouring matter), or to "fix" the flavour (e.g., sorbitol added to powdered or crystalline citrus fruit juices). However, the heading **excludes** fruit juices in which one of the constituents (citric acid, essential oil extracted from the fruit, etc.) has been added in such quantity that the balance of the different constituents as found in the natural juice is clearly upset; in such case the product has lost its original character.

The vegetable juices of this heading may also contain added salt (sodium chloride), spices or flavouring substances.

Similarly, intermixtures of the juices of fruits or vegetables of the same or different types remain classified in this heading, as do reconstituted juices (i.e., products obtained by the addition, to the concentrated juice, of a quantity of water not exceeding that contained in similar non-concentrated juices of normal composition).

The comment received in response to the proposal contends that Customs interpretation of substances permitted to be added to concentrated juice is "too narrow." Customs disagrees. In addition to requiring that the juices "retain their original character", the ENs are very specific about not only what may be added to a juice, but also the reason for its being added. See HQ 955893, dated June 6, 1994, which held that "sparkling apple juice"

was not classified as a juice because the addition of carbon dioxide did not "restore a constituent that was destroyed or damaged during a manufacturing process, and it does not prevent fermentation of the juice, then it is reasonable to conclude that the addition is for other reasons."

As described in NY 865903, maltodextrin is added to the Acerola extract powder as an anticaking agent. The ENS list four types of substances which may be added to juices. Maltodextrin does not fall within any of these types. It is not added as a sugar or sweetener. It is not added as a preservative, and it does not prevent fermentation. It is not a standardizing agent, and is not added to replace a lost constituent. Maltodextrin is not normally found in juices. Its addition causes the juice to lose its original character. Therefore, the Acerola extract of NY 865903 cannot be classified as a juice of chapter 20.

The Acerola extract powder will be used in the production of human food supplements. Because the product cannot be classified in a more specific heading, it is classified in heading 2106.90.9998, HTSUS, as a food preparation, not elsewhere specified or included, \* \* \* other.

*Holding:*

Acerola extract powder, Type 1000, containing an anticaking agent is classified in subheading 2106.90.9998, HTSUS, as a food preparation, not elsewhere specified or included, other, other, other, other, other, other, other, other.

NY 865903 dated November 5, 1991, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,  
(for John Durant, Director,  
Commercial Rulings Division.)

## REVOCATION OF A RULING LETTER AND REVOCATION OF TARIFF TREATMENT RELATING TO TARIFF CLASSIFICATION OF DISK CARTRIDGES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a tariff classification ruling letter and revocation of treatment relating to tariff classification of disk cartridges.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of disk cartridges under the Harmonized Tariff Schedule of the United States (HTSUS), and is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocation was published on January 5, 2000, in the CUSTOMS BULLETIN. No comments were received.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn April 24, 2000.

FOR FURTHER INFORMATION CONTACT: Robert F. Altneu, General Classification Branch, (202) 927-2403.

## SUPPLEMENTARY INFORMATION:

## BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are "informed compliance" and "shared responsibility". These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(1)), a notice was published on January 5, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 1, proposing to revoke NY ruling C81051, dated November 14, 1997, pertaining to the tariff classification of a Jaz Disk cartridge, model PC1GB. No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise a rebuttable presumption of a lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY C81051 and any other ruling not specifically identified, in order to classify this merchandise under subheading 8523.20.00, HTSUS, as prepared unrecorded media. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. HQ 962315, revoking NY C81051, is set forth as the Attachment to this document.

In accordance with 19 U.S.C. 1625 (c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: February 7, 2000.

MARVIN AMERNICK,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachment]

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[ATTACHMENT]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
Washington, DC, February 7, 2000.  
CLA-2 RR:CR:GC 962315 RFA  
Category: Classification  
Tariff No. 8523.20.00

MR. DIPAN KARUMSI  
ALLYN INTERNATIONAL SERVICES INC.  
P.O. Box 60577  
Ft. Myers, FL 33906-6577

Re: Jaz Disk Cartridges; Zip Disk Cartridges; Prepared Unrecorded Media; Other Recorded Media; Headings 8523 and 8524; HQ 953880; NY D82831; NY C81051, Revoked.

DEAR MR. KARUMSI:

This is in reference to your letter dated October 29, 1998, on behalf of Iomega Corporation, concerning the tariff classification of disk cartridges under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed NY ruling C81051, dated November 14, 1997, and have determined that it is in error. Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI, a notice was published on January 5, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 1, proposing to revoke NY C81051. No comments were received in response to this notice. Therefore, this ruling revokes NY C81051 and sets forth the correct classification for the Jaz Disk Cartridges.

**Facts:**

The merchandise consist of three disk cartridges, the Iomega Jaz Disk, model PC1GB, a Jaz Disk with 2 gigabytes (GB) of storage, and the Zip Disk. These disks or cartridges use hard disk technology and the recordings are stored magnetically on dual aluminum substrate "cookies." The cartridges will be fully formatted for use with IBM compatible or Macintosh computers. Both Jaz Disks contain an executable file application entitled "50JAZ," a display program that visually informs the consumer of applicable uses of the cartridge. The Jaz Disk, model PC1GB, also contains a text file entitled "USWARRANTY" which details the product warranty information for the benefit of the consumer. The Jaz Disks can only be used with the Iomega Jaz Drive.

The Zip Disk consists of a plastic housing and contains recorded media made of mylar coated plastic similar to a 3.5 inch diskette but with a storage capacity of 100 megabytes. The Zip Disk is formatted for use with IBM or Macintosh compatible machines. In addition to the formatting, the Zip Disk also contains an executable file application entitled "50Zip", a display program that visually informs the consumer of the applicable function of the disk cartridge. The Zip Disk can only be used with the Iomega Zip Drive.

In NY C81051, dated November 14, 1997, Customs determined that the Jaz Disk, model PC1GB, which contained two files, "50JAZ" and "USWARRANTY", was classifiable under subheading 8524.99.90 (now 8524.99.40), HTSUS, as other recorded media. In NY D82831, dated October 2, 1998, Customs determined that the Zip Disk and the Jaz Disk, with 2 GB of storage capacity, are used by consumers to record data. Customs concluded that these disks are classifiable under subheading 8523.20.00, HTSUS, as prepared unrecorded media.

#### Issue:

Are Jaz and Zip Disk Cartridges classifiable as prepared unrecorded media under heading 8523, HTSUS, or as other recorded media under heading 8524, HTSUS?

#### Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

The 1999 subheadings under consideration are as follows:

- 8523.20.00: Prepared unrecorded media for sound recording or similar recording of other phenomena, other than products of chapter 37: [m]agnetic discs \* \* \*
- 8524.99.40: Records, tapes and other recorded media for sound or other similarly recorded phenomena, including matrices and masters for the production of records, but excluding products of chapter 37: [o]ther: [o]ther: [o]ther. \* \* \*

Both provisions have a column one, general rate of duty of free.

All of the above products are removable disk cartridges that allow the end-users to maintain storage of files on a variety of computer systems. Customs has previously addressed the scope of headings 8523 and 8524 as it relates to disk drives and removable, interchangeable disk cartridges in HQ 953880, dated February 28, 1994. In HQ 953880, Customs dealt with the classification of SyQuest disk cartridges and noted the following:

Unlike conventional hard disks, which are permanently fixed in the disk drive assembly, the disk cartridges may be removed from one SyQuest drive and inserted into another. The instant disk cartridges are similar to 3.5-inch disks in that they merely consist of a magnetic disk in a hard plastic enclosure, a disk hub, and a spring access door.

The SQ400 hard disk cartridge has a total storage capacity of approximately 55 megabytes. The product is offered for sale, however, as having a user storage capacity of only 44 megabytes because the disk operating system utilizes approximately 10 megabytes of storage space.

The SQ800 removable hard disk cartridge has a total storage capacity of approximately 101 megabytes. However, the product is offered for sale as having a user storage capacity of 88 megabytes because the disk operating system utilizes approximately 13 megabytes.

In HQ 953880, SyQuest argued that the formatting, error mapping, etc., which prepares the disk to receive user data, merits a change in classification from prepared unrecorded media to recorded media. However, Customs concluded that all of the recorded data had one purpose, and that is to prepare the unrecorded media to store user data. Furthermore, the formatting, error mapping, etc., did not change the commercial identity of the disk cartridges as prepared unrecorded media. "The tariff schedules are written in the language of commerce, and the terms used are to be given their commercial or common meaning." See *Ameliotex, Inc. v. United States*, 65 CCPA 22, 25, C.A.D. 1200, 565 F.2d 674, 677 (1977); *Esco Mfg. Co. v. United States*, 63 CCPA 71, 73 C.A.D. 1167, 530 F.2d 949, 951 (1976). Customs further stated that: "[t]he fact that the instant disk cartridges may have more complex or substantial preparations than 3.5 inch disks or floppy disks is due solely to the fact that these disk cartridges are designed to store a larger amount of user data." See *Simmon Omega, Inc. v. United States*, 83 Cust. Ct. 14, C.D. 4815 (1979), and *Trans-Atlantic Co. v.*

*United States*, 471 F.2d 1397, 60 CCPA 100, C.A.D. 1088 (1973), in which the courts have held that technological advancements and "improvement in the design of an article does not militate against its continuing to be a form of the named articles."

We have reviewed the sales literature of the Jaz and Zip Disks and find that none of the advertisements on the Iomega website home page lists the executable application file as a feature. Instead, the information discusses how the user can use the disk cartridges to store large quantities of information files whether it is software, audio files, video files, graphics, etc. In HQ 953880, Customs stated that "blank" disks sold having been prepared with formatting does not change the disks' commercial identity or classification to recorded media. Based upon the analysis of HQ 953880, an examination of the merchandise and the sales literature, we find that the commercial identity of the Jaz disks and the Zip Disks is that of prepared unrecorded media, classifiable under heading 8523, HTSUS. Therefore, we find that Customs classification in NY C81051 for these types of devices is incorrect and should be revoked.

*Holding:*

The Iomega Jaz and Zip Disk Cartridges are classifiable under subheading 8523.20.00, HTSUS, which provides for: "[p]repared unrecorded media for sound recording or similar recording of other phenomena, other than products of chapter 37: [m]agnetic discs \* \* \*." The general, column one rate of duty is free.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,  
(for John Durant, Director,  
Commercial Rulings Division.)

## DATES AND DRAFT AGENDA OF THE TWENTY-FIFTH SESSION OF THE HARMONIZED SYSTEM COMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

**AGENCIES:** U.S. Customs Service, Department of the Treasury, and U.S. International Trade Commission.

**ACTION:** Publication of the dates and draft agenda for the twenty-fifth session of the Harmonized System Committee of the World Customs Organization.

**SUMMARY:** This notice sets forth the dates and draft agenda for the next session of the Harmonized System Committee of the World Customs Organization.

**DATE:** February 9, 2000.

**FOR FURTHER INFORMATION CONTACT:** Myles B. Harmon, Director, International Agreements Staff, U.S. Customs Service (202-927-2255), or Eugene A. Rosengarden, Director, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (202-205-2592).

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System"), an international nomenclature system, form the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States. The Harmonized System Convention is under the jurisdiction of the World Customs Organization (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include issuing classification decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in Brussels, Belgium. The next session of the HSC will be the twenty-fifth, and it will be held from March 20-31, 2000.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418), the Department of the Treasury,

represented by the U.S. Customs Service, the Department of Commerce, represented by the Census Bureau, and the U.S. International Trade Commission ("IT"), jointly represent the U.S. government at the sessions of the HSC. The Customs Service representative serves as the head of the delegation at the sessions of the HSC.

Set forth below is the draft agenda for the next session of the HSC. Copies of available agenda-item documents may be obtained from either the Customs Service or the ITC. Comments on agenda items may be directed to the above-listed individuals.

Dated: February 9, 2000.

MYLES B. HARMON,  
*Director,*  
*International Agreements Staff.*

[Attachment: Attachment A]

**DRAFT AGENDA FOR THE TWENTY-FIFTH SESSION OF THE  
HARMONIZED SYSTEM COMMITTEE**

Monday, March 20 (10 a.m.) to Friday, March 31, 2000

N.B. Questions under Agenda Item VII will be examined first by the presessional Working Party (from Wednesday March 15 to Friday March 17, 2000).

**I.**

**ADOPTION OF THE AGENDA**

Draft Agenda .....	NC0164E1
Draft Timetable .....	NC0165B1

**II.**

**REPORT BY THE SECRETARIAT**

1. Position regarding Contracting Parties to the HS Convention and related matters .....	NC0166E1
2. Report on the meeting of the Policy Commission (42 <sup>nd</sup> Session) .....	NC0167E1
3. Approval of decisions taken by the Harmonized System Committee at its 24 <sup>th</sup> Session .....	NG0013E1 NG0014E1 NC0168E1
4. Recommendation of 25 June 1999 concerning amendments to the Harmonized System .....	NC0231E1
5. Technical assistance activities of the Nomenclature and Classification Sub-Directorate .....	NC0169E1
6. Co-operation with other international organisations .....	NC0170E1
7. Co-operation with the Technical Committee on Rules of Origin .....	NC0171E1
8. Development of HS audio-visual training materials .....	NC0172E1
9. Development of Correlation Tables .....	NC0173E1
10. HS databases and Web sites .....	NC0174E1
11. Format of the HS Committee documents .....	NC0201E1
12. Other .....	

**III.**

**GENERAL QUESTIONS**

1. Survey on the non-application of HSC decisions .....	NC0175E1
2. Survey on the use of the HS Explanatory Notes .....	NC0176E1
3. Annual survey to determine the percentage of national revenues represented by Customs duties .....	NC0177E1

**IV.**

**RECOMMENDATIONS**

1. Draft Recommendation of the Customs Co-operation Council concerning artisanal products .....	NC0179E1
2. Draft Recommendation of the Customs Co-operation Council on the insertion in national statistical nomenclatures of subheadings to facilitate the monitoring and control of products specified in the Protocol concerning firearms covered by the UN Convention against transnational organized crime .....	NC0180E1

**V.**

**REPORT OF THE SCIENTIFIC SUB-COMMITTEE**

1. Report of the 15 <sup>th</sup> Session of the Scientific Sub-Committee .....	NS0014E1
2. Matters for decision by the Harmonized System Committee .....	NC0181E1

## VI.

## REPORT OF THE HS REVIEW SUB-COMMITTEE

- |  |                                  |
|--|----------------------------------|
| 1. Report of the 20 <sup>th</sup> Session of the HS Review Sub-Committee ..... | NR0072E2<br>(RSC/20)             |
| 2. Report of the 21 <sup>st</sup> Session of the HS Review Sub-Committee ..... | NR0101E2                         |
| 3. Matters for decision by the Harmonized System Committee .....               | NC0104E1<br>(HSC/24)<br>NC0182E1 |

## VII.

## REPORT OF THE PRESESSIONAL WORKING PARTY

- |   |                                  |
|---|----------------------------------|
| 1. Draft amendment of the Rules of Procedure of the Harmonized System Committee .....   | NC0183E1                         |
| 2. Amendment of the Explanatory Notes arising from the classification of bitter limes referred to as " <i>Citrus latifolia</i> " in subheading 0805.90 .....                              | NC0184E1                         |
| 3. Amendments to the Compendium of Classification Opinions arising from the classification of "chicken sauce" in subheading 2103.90 .....   | NC0185E1                         |
| 4. Amendment of the Explanatory Notes concerning the osmotic dehydration process .....  | NC0126E1<br>(HSC/24)<br>NC0186E1 |
| 5. Deleted  |                                  |
| 6. Amendment of the Explanatory Notes arising from the classification of "gas condensates" in heading 27.09 .....   | NC0188E1                         |
| 7. Amendments to the Compendium of Classification Opinions arising from the classification of regular "Veegum" in subheading 3824.90 .....  | NC0189E1                         |
| 8. Amendments to the Compendium of Classification Opinions arising from the classification of certain drilled lumber used in construction in subheading 4418.90 .....                     | NC0190E1                         |
| 9. Amendment of the Explanatory Notes arising from the classification of galvanized steel roofing tiles in subheading 7308.90 .....   | NC0191E1                         |
| 10. Amendments to the Compendium of Classification Opinions arising from the classification of a non-electric stainless steel chafing dish ("bain-marie") in subheading 7323.93 .....     | NC0192E1                         |
| 11. Amendments to the Compendium of Classification Opinions arising from the classification of a laminated product, called "PolySwitch", in subheading 7506.10 .....                      | NC0193E1                         |
| 12. Amendments to the Compendium of Classification Opinions arising from the classification of a freezer for foodstuffs in subheading 8418.30 .....                                       | NC0194E1                         |
| 13. Amendment of the Explanatory Note to heading 84.19 arising from the classification of certain microwave ovens in subheading 8514.20 .....   | NC0195E1                         |
| 14. Amendment of the Explanatory Note to heading 84.71 to delete certain obsolete equipment .....   | NC0197E1                         |
| 15. Deleted   |                                  |
| 16. Amendment of the Explanatory Notes arising from the classification of closed circuit video equipment .....  | NC0199E1                         |
| 17. Amendments to the Compendium of Classification Opinions arising from the classification of the "PIX-DSX-1 Digital Cross-Connect" in subheading 8536.90 .....                          | NC0200E1                         |
| 18. Amendments to the Compendium of Classification Opinions arising from the classification of the vehicles "Ssang Yong Musso 601" and "Ssang Yong Musso 602" in subheading 8702.10 ..... | NC0213E1                         |
| 19. Amendments to the Compendium of Classification Opinions arising from the classification of two-wheeled golf carts in subheading 8716.80 .....   | NC0202E1                         |
| 20. Amendments to the Compendium of Classification Opinions arising from the classification of the "SelectSet Avantra 30" in subheading 9006.10 .....                                     | NC0203E1                         |

*REPORT OF THE PRESESSIONAL WORKING PARTY—Continued*

21. Amendments to the Compendium of Classification Opinions and the Explanatory Notes arising from the classification of the "FIRE 9000" and "FIRE 1000" apparatus in subheadings 9006.59 and 9006.10, respectively . . NC0204E1
22. Amendments to the Compendium of Classification Opinions arising from the classification of laser pointers in subheading 9013.20 . . . . . NC0205E1

## VIII.

*FURTHER STUDIES*

1. Classification of various items of networking equipment (Reservation by the EC) . . . . . NC0120E1  
NC0153E1  
(HSC/24)
2. Classification of the "ENW-9500-F Fast Ethernet Adapter" in su heading 8471.80 (Reservation by the EC) . . . . . NC0124E1  
(HSC/24)
3. Classification of repeaters used in LAN systems or in the telephone line system . . . . . 42.449  
(HSC/22)  
NC0049E1  
(HSC/23)
4. Classification of a video card, sound card and software therefor . . . . . NC0052E1  
NC0074E1  
(HSC/23)
5. Classification of the "Color QuickCam" (Reservation by Japan) . . . . . NC0210E1  
NC0233E1
6. Classification of the "Iris 3047" ink-jet printer in subheading 8443.51 (Reservation by Japan) . . . . . NC0196E1
7. Amendment of the Explanatory Notes to heading 38.16 (Reservation by Canada) . . . . . NC0207E1
8. Classification of the "Smirnoff Mule" beverage . . . . . NC0062E1  
(HSC/23)  
NC0206E1
9. Deleted
10. Possible amendments to the Nomenclature and/or Explanatory Notes to clarify the classification of certain crisps in heading 19.05 . . . . . NC0128E1  
(HSC/24)
11. Classification of "high fat cream cheese" and possible creation of a definition of cheese of heading 04.06 . . . . . NS0002E1  
(SSC/15)
12. Amendment of the Explanatory Notes arising from the classification of "chicken sauce" in subheading 2103.90 . . . . . NC0208E1
13. Classification of vibrators . . . . . NC0209E1
14. Classification of multifunctional digital copiers . . . . . NC0211E1
15. Possible amendments to the Explanatory Notes to clarify the classification of "smart cards" . . . . . NC0212E1
16. Classification of the "Tata Sumo 483" motor vehicle . . . . . NC0234E1
17. Classification of a compression type refrigerating unit . . . . . NC0041E1  
(HSC/23)  
NC0198E1

## IX.

*NEW QUESTIONS*

1. Classification of "Rougher headed lumber" . . . . . NC0140E1  
NC0157E1  
(HSC/23)  
NC0163E1  
(HSC/24)
2. Classification of "Notched lumber" . . . . . NC0141E1  
NC0159E1  
(HSC/24)

*NEW QUESTIONS—Continued*

3. Classification of certain special textile yarns .....	NC0148E1 (HSC/24)
4. Classification of uncooked pizza .....	NC0214E1
5. Possible amendment of the Explanatory Note to heading 84.71 with regard to "readers which decode data inscribed on cards or tape" .....	NC0215E1
6. Classification of automatic control units .....	NC0216E1
7. Classification of touch panels .....	NC0217E1
8. Classification of game controllers .....	NC0218E1
9. Classification of print engines .....	NC0219E1
10. Classification of graphic tablets/digitizers .....	NC0220E1
11. Classification of DVD storage units .....	NC0221E1
12. Classification of optical and tape autoloaders and libraries .....	NC0222E1
13. Deleted	
14. Classification of proprietary storage formats .....	NC0224E1
15. Classification of flash electronic storage cards .....	NC0225E1
16. Classification of the "Whistler 1120" .....	NC0226E1
17. Study with a view to establishing guidelines for the classification of vehicles of headings 87.02, 87.03 and 87.04 .....	NC0227E1
18. Study of the scope of the terms "domestic" and "household" in the Nomenclature and the Explanatory Notes .....	NC0228E1
19. Classification of lumbar support belts .....	NC0230E1
20. Classification of a tobacco mixture known as "Basic Blended Strips" ...	NC0223E1
21. Classification of tire inflation valves .....	NC0232E1

## X.

*ELECTION OF CHAIRMAN AND VICE-CHAIRMEN*

## XI.

*OTHER BUSINESS*

1. List of questions which might be examined at a future session .....	NC0229E1
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## XII.

*DATES OF NEXT SESSIONS*

# United States Court of International Trade

One Federal Plaza  
New York, N.Y. 10278

*Chief Judge*  
Gregory W. Carman

*Judges*

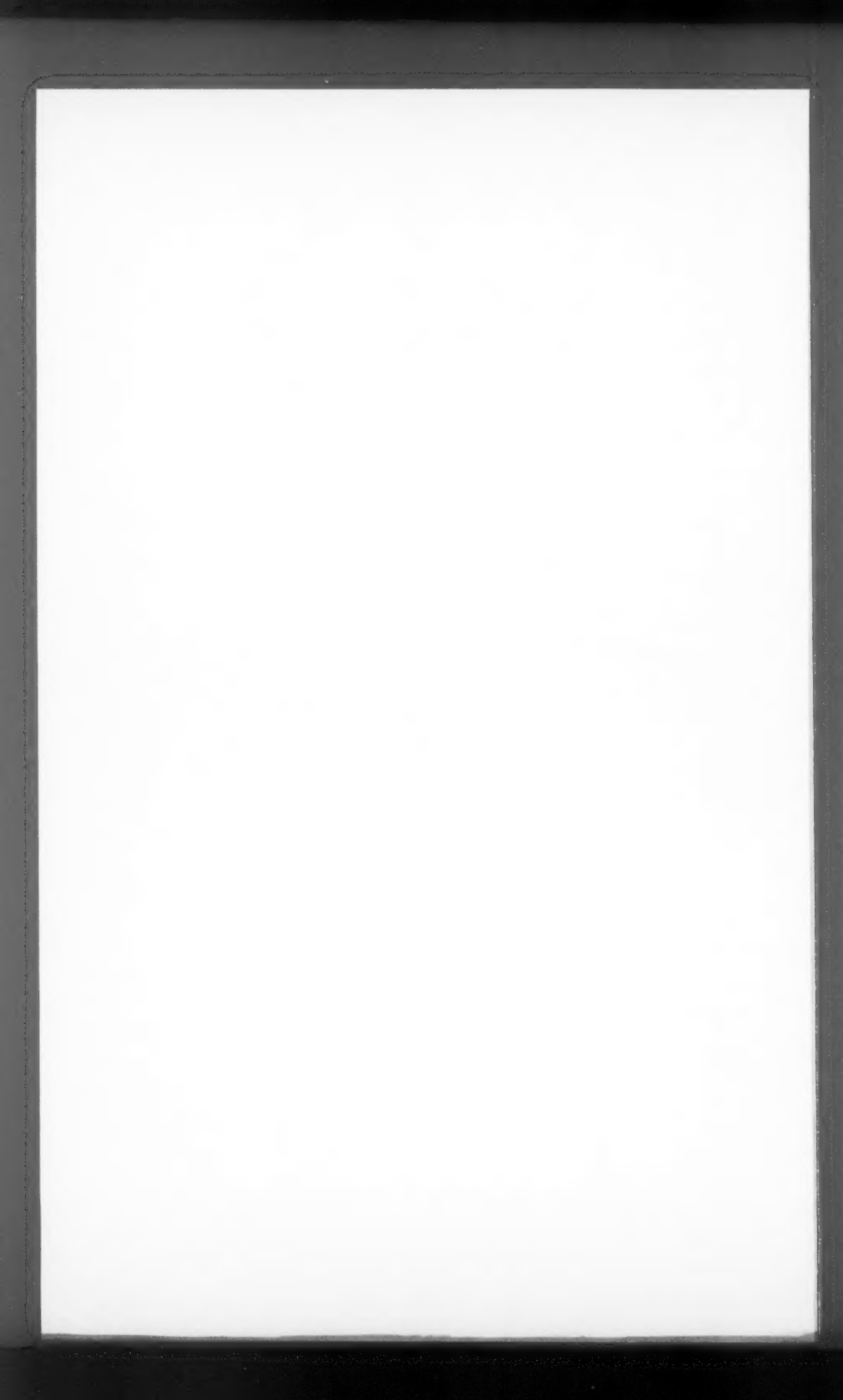
Jane A. Restani  
Thomas J. Aquilino, Jr.  
Richard W. Goldberg  
Donald C. Pogue

Evan J. Wallach  
Judith M. Barzilay  
Delissa Anne Ridgway  
Richard K. Eaton

*Senior Judges*

James L. Watson  
Herbert N. Maletz  
Nicholas Tsoucalas  
R. Kenton Musgrave

*Clerk*  
Leo M. Gordon



# Decisions of the United States Court of International Trade

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(Slip Op. 00-8)

HOOGOVS STAAL BV, ET AL., PLAINTIFFS v. UNITED STATES, DEFENDANT

Consolidated Court No. 98-04-00926

[Plaintiffs HOOGOVS, a foreign steel producer and its affiliated U.S. importer, move for judgment on the agency record contesting Commerce's level of trade determination in its *Final Results* of the third administrative review of the antidumping duty order on certain steel products from The Netherlands. The *Final Results* are remanded to Commerce for clarification of the evidentiary basis for its determination that Hoogovens' sales were made at two levels of trade, Commerce's alleged use of facts otherwise available and adverse inferences pursuant to 19 U.S.C. § 1677e(a) and (b), and explication of Commerce's compliance, if any, with § 1677m(d).

Domestic steel industry plaintiffs move for judgment upon the agency record contesting Commerce' determination in its *Final Results* not to apply its reimbursement regulation, 19 C.F.R. § 353.26(a), in calculating Hoogovens' margins of dumping, and Commerce's treatment of Hoogovens' home market warranty and technical service expenses as direct expenses. Commerce's reimbursement determination is supported by substantial evidence on the record and is affirmed. The *Final Results* are remanded to Commerce to reconsider its treatment of warranty and technical service expenses.]

(Dated January 21, 2000)

*Powell, Goldstein, Frazer & Murphy, LLP* (Peter O. Suchman, David J. Sullivan, and Niall P. Meagher, Esqs.) for plaintiffs Hoogovens Staal BV and Hoogovens Steel USA, Inc.

*Skadden, Arps, Slate, Meagher & Flom LLP* (Robert Lighthizer and John J. Mangan, Esqs.) for plaintiffs U.S. Steel Group A Unit of USX Corporation, Bethlehem Steel Corporation, Inland Steel Industries, Inc., LTV Steel Company, Inc. and National Steel Corporation.

*David W. Ogden*, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Katherine A. Barski*, Attorney); *David R. Mason, Jr.*, Attorney Advisor, Office of Chief Counsel, United States Department of Commerce, of counsel, for defendant.

## OPINION AND ORDER

## INTRODUCTION

WATSON, *Senior Judge*: Plaintiffs<sup>1</sup> move for judgment upon the agency record pursuant to Rule 56.2 of the rules of the United States Court of International Trade challenging certain determinations made in the final results of the third annual administrative review by the International Trade Administration, United States Department of Commerce ("Commerce") of the antidumping duty order covering certain cold-rolled carbon steel flat products from the Netherlands.<sup>2</sup> *Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands: Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 13,204 (Dep't. of Commerce, March 18, 1998) ("Final Results"), for the period of August 1, 1995 through July 31, 1996 (the "POR").<sup>3</sup> Commerce initiated the third administrative review on September 17, 1996. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 61 Fed. Reg. 48,882 (Dep't of Commerce, Sept. 17, 1996).<sup>4</sup> Commerce published the preliminary results of the third administrative review on September 9, 1997, *Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands: Preliminary Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 47,418 (Dep't of Commerce, September 9, 1997). The administrative review was conducted under the provisions of section 751(a)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a)(1), and the court's jurisdiction is predicated on 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c).

## PARTIES' CONTENTIONS

HOOGOVS contend: (1) since it did not claim any level of trade adjustment, Commerce acted contrary to law in placing a burden of proof on Hoogovens to demonstrate that its sales were not made at two levels of trade in the home market and export market; (2) Hoogovens' information submitted in response to Commerce's questionnaires was complete, detailed, and responsive, and all evidence of record shows sales were made at one level of trade; (3) since Hoogovens fully responded and provided detailed information to Commerce's questionnaires and otherwise fully cooperated, Commerce inappropriately used facts available and adverse inferences pursuant to 19 U.S.C. § 1677e(a) and (b) in determining that sales were made at two levels of trade; (4) Commerce failed to give Hoogovens prompt notice of any inadequacy or deficiency in the responses and give Hoogovens an opportunity to remedy deficiency

<sup>1</sup> Domestic steel industry plaintiffs are: U.S. Steel Group, A Unit of USX Corporation; Bethlehem Steel Corporation; Inland Steel Industries, Inc.; LTV Steel Company, Inc.; and National Steel Corp. (collectively, "domestic steel producers"). Hoogovens Staal BV is a Netherlands steel producer and Hoogovens Steel USA, Inc. is an affiliated U.S. importer (collectively, "Hoogovens").

<sup>2</sup> *Antidumping Duty Order: Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands*, 58 Fed. Reg. 44172 (Dep't of Commerce, August 19, 1993).

<sup>3</sup> Commerce had previously conducted administrative reviews covering the periods 1993/94 and 1994/95.

<sup>4</sup> Because the third review was initiated after January 1, 1995, the applicable antidumping law and regulations are those in effect following the changes in law by the Uruguay Round Amendments Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (the "URAA"). See URAA § 291(a)(2), (b); *NSK LTD. v. Nippon Pillow Block Sales Co., Ltd.*, 190 F.3d 1321, 1325 (Federal Circuit, September 2, 1999), citing *Cemex, S.A. v. United States*, 133 F.3d 897, 899 n. 1 (Fed. Cir. 1998).

cies, in violation of § 1677m(d); (5) Commerce's determination that there was no reimbursement of antidumping duties and that warranty and technical service expenses in the home market were properly treated as direct are supported by substantial evidence on the record.

Domestic steel producers claim: (1) Commerce's determination there was no reimbursement of antidumping duty assessments and failure to apply its reimbursement regulation, 19 C.F.R. § 353.26(a), is unsupported by substantial evidence on the record and contrary to law since the evidence of record shows financial intermingling directly linked to reimbursement; (2) Commerce treatment of Hoogovens' unsegregated direct and indirect warranty and technical service expenses in the home market as all direct is contrary to law; (3) Hoogoven's information, including that submitted in the second administrative review, establishes two levels of trade, and Commerce's level of trade determination is supported by substantial evidence on the record and is in accordance with law; (4) Commerce properly resorted to facts otherwise available in compliance with 19 U.S.C. § 1677e(a) and 1677m(d).

Defendant contends: (1) Hoogovens' failed to sustain its burden of proof that its home market and U.S. sales were made at the same level of trade; (2) Commerce's determination that sales were made at two levels of trade is supported by substantial evidence on the record; (3) Commerce's determination that Hoogovens' sales were made at two levels of trade is based, in whole or in part, on facts otherwise available pursuant to § 1677e(a), but not on adverse inference pursuant to § 1677e(b); (4) Commerce's determinations that the U.S. importer's restructuring did not involve financial intermingling linked to reimbursement of antidumping duties and that the reimbursement regulation should not be applied to Hoogovens is supported by substantial evidence on the record and is in accordance with law; (5) Commerce may have erred in its treatment of warranty and technical service expenses in the home market as all direct, and therefore, the case should be remanded for reconsideration of such expenses.

#### REIMBURSEMENT OF ANTIDUMPING DUTIES

In its *Final Results* Commerce determined that Hoogovens had overcome a rebuttable presumption that it was continuing to reimburse the affiliated U.S. importer for assessments of antidumping duties.<sup>5</sup> Domestic steel producers, however, insist that since the evidence of record establishes the financial restructuring of the importer constituted nothing

<sup>5</sup> During the third administrative review, Commerce issued the following proposed statement of policy concerning rebuttable presumptions of reimbursement of antidumping duty assessments: "[Commerce] continues to presume that exporters and producers do not reimburse importers for antidumping duties, absent direct evidence of such activity. However, where [Commerce] determines in the final results of an administrative review that an exporter or producer has engaged in the practice of reimbursing the importer, [Commerce] will presume that the company has continued to engage in such activity in subsequent reviews, absent a demonstration to the contrary. Accordingly, if the producer or exporter claims that the reimbursement situation no longer exists, such producer or exporter must satisfy [Commerce] that (1) the importer is solely responsible for the payment of the antidumping duty, and (2) either (a) the importer was, and continues to be, financially able to pay the antidumping duties, or (b) a corporate event, such as a corporate restructuring or a capital infusion, enabled the importer to generate enough income to pay such duty." *Final Results* at 13213 (citing to December 18, 1997 Supplemental Questionnaire, Conf. Doc. 44, at 1).

more than a *post hoc* attempt by Hoogovens to avoid the application of the reimbursement regulation and involved financial intermingling linked to reimbursement, Commerce's reimbursement determination is unsupported by substantial evidence on the record and otherwise contrary to law.

For the following reasons, the court sustains Commerce's reimbursement determination.

Commerce's reimbursement regulation, 19 C.F.R. § 353.26(a), provides, so far as pertinent, that Commerce will deduct from United States price the amount of any antidumping duty that the producer or reseller (1) paid directly on behalf of the importer, or (2) reimbursed to the importer. The application of the regulation effectively increases the margin of dumping, and hence the amount of antidumping duties assessed, by the amount of any reimbursement of antidumping duties. See *Color Television Receivers from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 4408, 4410 (Dep't of Commerce, 1996) ("In effect, antidumping duties raise prices of the subject merchandise to importers, thereby providing a level playing field upon which injured United States industries can compete. The remedial effect of the law is defeated, however, where exporters themselves pay antidumping duties, or reimburse importers for such duties"). See also *Torrington Co. v. United States*, 127 F.3d 1077, 1080-81 (1997).

The objective of the reimbursement regulation is to ensure that the remedial purpose of the antidumping law is not compromised by the payment or reimbursement of antidumping duties by the foreign producer and exporter that would in effect relieve the importer of the financial consequences of dumping. In *Hoogovens Staal BV v. United States*, 4 F. Supp. 2d 1213, 1217 (CIT 1998), the court addressed the purpose of the reimbursement regulation:

If the exporter assumes the cost of antidumping duties, an importer could continue to import at the lower, dumped price. U.S. producers would remain at a competitive disadvantage without the benefit of a viable remedy for the injury caused by the dumped imports. The regulation preserves the statutory remedy by accounting for the amount of duties reimbursed or paid by the exporter so that the final assessed duty will remedy the injury. Presumably, an exporter will be reluctant to continue paying the cost of antidumping duties because the margin will increase accordingly each time Commerce reviews it. Thus, the effect of the [antidumping] order on import prices will be preserved.

Domestic steel producer plaintiffs contend that in accordance with its established practice to apply the reimbursement regulation to affiliated

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The domestic producers opposed the policy insofar as the reimbursement regulation would not be applied when a corporate event, such as a capital infusion, "enabled the importer to generate sufficient income to pay" antidumping duties. Petitioners' Comments on Hoogoven's Supplemental Questionnaire Response (Jan. 30, 1998), Pub. Doc. 102 at 9. See *Inland Steel Industries, Inc. v. United States*, 188 F.3d 1349 (Fed. Cir. August 24, 1999 (validity of agency presumptions are subject to judicial review)).

Because Commerce found in the first administrative view that Hoogovens reimbursed its U.S. affiliate for antidumping duties, following its new policy guidelines in the third review, Commerce presumed that the earlier reimbursement activity continued, thus putting the burden of proof on Hoogovens and its U.S. affiliate to demonstrate the absence of reimbursement activity during the POR.

parties where the record shows "financial intermingling linked to reimbursement," Commerce should have applied the regulation to Hoogovens since the record of this review establishes that the capital restructuring of the U.S. affiliate involved such financial intermingling. Defendant and Hoogovens, however, argue that the facts of record demonstrate that in the restructuring there was no financial intermingling linked to reimbursement of antidumping duties within the POR.

The court finds that Commerce's reimbursement determination is supported by substantial evidence on the record and is not contrary to law.

In its first administrative review, covering the period of August 18, 1993 through July 31, 1994, Commerce determined that pursuant to an agreement between the parties, Hoogovens reimbursed its affiliated importer for antidumping duties, 61 Fed. Reg. 48,465 (Sept. 13, 1996), and accordingly, Commerce deducted antidumping duties from United States price pursuant to the regulation, 19 C.F.R. § 353.26; 61 Fed. Reg. at 48,470. In *Hoogovens Staal BV v. United States*, *supra*, the final results of the first administrative review were affirmed.

However, in the second administrative review, Commerce found Hoogovens was no longer reimbursing its affiliated importer for payment of antidumping duties, and therefore, Commerce did not find reimbursement had occurred during that period of review. 62 Fed. Reg. 18,476, 18,477-78 (Dep't of Commerce, April 15, 1997). In *Bethlehem Steel Corp. v. United States*, 27 F. Supp. 2d 201, 207-08 (CIT 1998), Commerce's determination there was no reimbursement of antidumping duties was sustained by the court based on evidence that: (1) Hoogovens and its affiliated importer had revised their agency agreement, thereby making the importer solely responsible for paying any antidumping duties to be assessed; (2) the importer had begun refunding to the producer antidumping duty cash deposits previously advanced.

As indicated above, in the *Final Results* of the third review, after applying a rebuttable presumption of reimbursement and putting the burden of proof on Hoogovens, Commerce determined that on the basis of the facts of record no reimbursement for antidumping duties occurred during the POR. Commerce examined the corporate restructuring in Hoogovens' United States operations and found that the U.S. affiliate had "the financial ability [on its own] to generate sufficient income to pay antidumping duties to be assessed." *Final Results* at 13215. Commerce states:

We agree with petitioners that, under certain circumstances, the corporate event, such as a capital infusion, may be the very means of reimbursing the importer. The Department's policy is crafted to address the instances in which there has been a finding of reimbursement and the importer is financially unable to pay the duty on its own. In that circumstance, the Department will determine that the importer must continue to rely on reimbursements, such as intra-corporate transfers, from the producer or exporter in order to meet its obligation to pay the duties. However, where a corporate event,

such as restructuring, has occurred, the importer must demonstrate that this event provides a continuing source of income to the importer such that the importer is able to pay the antidumping duty on its own (i.e., based upon the importer's total income). In contrast, a capital infusion that is used to pay antidumping duties directly would constitute further reimbursement of antidumping duties. In such a case, the Department will deduct the amount of the reimbursement from U.S. price in calculating the dumping margin.

#### *Final Results at 13214.*

In the *Final Results* Commerce concluded from the amended agreement of December 18, 1996 between Hoogovens and its U.S. affiliate (Commerce Reimbursement Memorandum of August 29, 1997, Conf. Doc. 34, at 2), and other evidence on the record that "Hoogovens has met its burden of establishing that its affiliated importer, HSUSA, (1) is solely responsible for the payment of the antidumping duties in this review; and (2) has the financial ability to generate sufficient income to pay the antidumping duties to be assessed." *Final Results* at 13215. Commerce also found that there was no longer any agreement to reimburse the affiliated importer for antidumping duties to be assessed, that the U.S. affiliate refunded to Hoogovens the sums advanced for the payment of cash deposits for antidumping duties, and that the importer is generating sufficient income to pay the duties on its own. Therefore, based on the foregoing facts of record, Commerce determined that no reimbursement existed. *Final Results* at 13215.

As noted above, in *Bethlehem, Steel*, 27 F. Supp. 2d at 207, the court held that the provisions of the revised agency agreement which eliminated reimbursement of antidumping duties, and the refund of cash deposits for antidumping duties constituted substantial evidence to support Commerce's determination not to apply the reimbursement regulation in the second administrative review. On the basis of the administrative record in the third review, no different conclusion is warranted here since there is no evidence related to the restructuring that shows a concrete link between any of the restructuring events or transactions and reimbursement of antidumping duties. See *Torrington Co. v. United States*, 127 F.3d at 1077 (application of the reimbursement regulation requires the showing of "some concrete link" between particular intra-corporate transfers and payment of antidumping duties). Commerce's factual predicates, as set forth in the *Final Results*, for its determination there was no reimbursement of antidumping duties during the POR are consistent with a finding of no financial intermingling linked to reimbursement.

The court will uphold Commerce's determination unless it is found "unsupported by substantial evidence on the record, or otherwise not in accordance with law." *The Thai Pineapple Public Co., Ltd. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. July 28, 1999) (citing *Micron Technology, Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)). "Substantial evidence" is "more than a mere scintilla and such relevant evidence as a reasonable mind

might accept as adequate to support a conclusion, taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence." *Atlantic Sugar Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). The Supreme Court has stated that "substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "Substantial evidence" has also been defined as evidence "which could reasonably lead to [Commerce's] conclusion," so that the conclusion can be described as a "rational decision." *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

Additionally, in reviewing agency determinations the court declines to reweigh or reinterpret the evidence of record. See *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (noting that the substantial evidence standard "frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute"). It is not the province of this court to review the record evidence to determine whether a different conclusion could be reached, but to determine whether Commerce's determination is supported by substantial evidence. See *Inland Steel Industries, Inc. v. United States*, 188 F.3d 1349, 1359 (Fed. Cir. August 24, 1999), citing *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1236 (Fed. Cir.1992). See also *Consolo*, 383 U.S. at 620 ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence").

Domestic steel industry producers contend that Commerce ignored record evidence of financial intermingling linked to reimbursement. Commerce, however, closely examined the events and circumstances surrounding the corporate restructuring of Hoogovens' U.S. affiliate and concluded there was nothing of record to suggest that there was a reimbursement of antidumping duties. Investigations of corporate restructurings and other corporate events for purposes of the antidumping laws involve inquiries into complex economic, accounting and financial matters in which Commerce has particular expertise, and Commerce's determinations in such matters are entitled to deference. See *The Thai Pineapple Public Co., Ltd.*, 187 F.3d at 1365. That plaintiff can point to evidence \*\*\* which detracts from \*\*\* [Commerce's] decision and can hypothesize a \*\*\* basis for a contrary determination is neither surprising nor persuasive." *Matsushita Elec. Indus. Co.*, 750 F.2d at 936. See also *United States Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996) (Agency determinations must be sustained if reasonable, whether or not the court would have come to the same conclusion in reviewing the evidence in the first instance); *PPG Industries*, 978 F.2d at 1237 (quoting *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 619-20 (1965)) ("[T]he possibility of drawing two inconsistent con-

clusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (court should not supplant agency's findings that are supported by substantial evidence merely by identifying alternative findings supported by substantial evidence). See also *The Thai Pineapple Public Co., Ltd.*, 187 F.3d at 1365 (citing *Fijitsu General Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996)).

There is no statute governing how Commerce must address reimbursement of antidumping duties, but as previously noted, Commerce promulgated a reimbursement regulation, 19 C.F.R. § 353.26. The regulation, however, does not specifically address corporate restructuring or capital infusions. In furtherance of implementing its reimbursement regulation, Commerce issued the statement of policy discussed *supra* at footnote five. As noted therein, domestic producers disagree with Commerce that its reimbursement regulation should not be applied when a corporate event, such as a capital infusion, "enabled the importer to generate sufficient income to pay" antidumping duties. *Statement of Policy*, see n.5, *supra*.

As the Supreme Court instructed in its landmark decision, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), where "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. However, in the absence of clear legislative guidance, the reviewing court must defer to the Department's reasonable legal interpretations." See also *NSK Ltd. v. Koyo Seiko Co., Ltd.*, 190 F.3d 1321 (Federal Circuit September 2, 1999), citing *Timex VI, Inc. v. United States*, 157 F.3d 879, 881-82 (Fed. Cir. 1998); *The Thai Pineapple Public Co., Ltd.*, 187 F.3d at 1365; *British Steel PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997); *Torrington Co. v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996); *Koyo Seiko v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994); *Daewoo Elec. Co. v. International Union*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994).

In the *Final Results*, Commerce found that "the facts and circumstances surrounding the corporate restructuring are clear and consistent with the purposes of the [reimbursement] regulation. *Id.* at 13214. Fundamentally, of course, substantial deference must be given to an agency's interpretation of its own regulations that implement a statute that it administers. "[S]ubstantial deference [is owed] to Commerce's interpretations of its own regulations." *NSK Ltd.*, 190 F.3d at 1326 (citing *Torrington Co. v. United States*, 156 F.3d 1361, 1363-64 (Fed. Cir. 1998)). As the court observed in *Torrington*: "[T]he agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation \* \* \* This broad deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the

*exercise of judgment grounded in policy concerns.*" (Emphasis added.) With respect to the application of the reimbursement regulation to corporate restructuring activities, the foregoing quotation from *Torrington* is especially in point. See also *Torrington*, 127 F. 3d at 1080 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 509, 512 (1994)); *Asociacion Colombiana de Exportadores de flores v. United States*, 903 F. 2d 1555, 1559 (Fed. Cir. 1990) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order").

Domestic steel industry producers contend that Hoogovens engaged in restructuring intended solely to avoid the application of the reimbursement regulation and has failed to provide any other rationale for the restructuring; and that a restructuring intended to provide the importer with continuing financial ability to generate income to pay antidumping duties on its own is an unlawful circumvention of the regulation. The court must reject as a totally unsound concept that avoidance of the application of the reimbursement regulation in the manner alluded to by domestic steel industry plaintiffs should itself be a basis for applying the regulation.

As aptly pointed out by the Government, adoption of the domestic steel producers' position would mean in effect that a financial restructuring intended by the parties to avoid the need for future reimbursements would itself be a self-defeating "reimbursement." According to the Government, "[t]he reimbursement regulation was not intended to lock importers into successive reimbursement findings, regardless of any ameliorative steps [including restructuring] importers may take." *Def't's Mem. in Partial Opp. to Plif's Motions* at 32. Moreover, the court must agree with defendant that to interpret the regulation in the manner insisted upon by domestic producers would require Commerce to parse all corporate restructurings and other such events, which businesses engage in for various and sundry reasons, to determine whether or not (or to what extent) an intent to provide the importer with financial ability to pay antidumping duty assessments on its own was a motivation for the restructurings, which would be extremely burdensome at best, and perhaps impractical.

Commerce's reimbursement determination is supported by substantial evidence on the record and is not contrary to law. Therefore, the determination is sustained.

## LEVEL OF TRADE

### I.

#### BURDEN OF PROOF

Pursuant to 19 U.S.C. § 1677b(a)(7), Commerce makes comparisons of normal value and export price at the same levels of trade; normal value may be increased or decreased to make allowance for any differences between the export price and normal value that is wholly or partly due to a difference in the levels of trade in the two markets.

Commerce determined that Hoogovens failed to sustain its burden of proving its claim that all sales were made at one level of trade, and that the sales to its end-user and service center customers were made at two different levels of trade.

At issue here is Hoogovens' contention that all sales in the home market and for export to the United States (export price sales) to its two customer groups—end-users and steel service centers—were made at a single level of trade and, therefore, no level of trade adjustments are necessary.

Hoogovens does not dispute that it was required to fully comply with Commerce's requests for information, but vigorously disagrees with Commerce that it had any "burden of proof" to show there was not two levels of trade. Rather, according to Hoogovens, a respondent who does not claim any adjustment for different levels of trade need not prove a negative, i.e., that different levels of trade *do not* exist, and therefore, adjustments for different levels of trade are *not* required. In essence, then, Hoogovens maintains that since it made no claim to Commerce for any adjustments for different levels of trade, Commerce should simply have automatically calculated the margin of dumping without level of trade adjustments on the basis that all sales in the home market and for export were made at a single level of trade. Commerce posits that whether or not a respondent sustains its burden of proof, the agency has the responsibility for determining what levels of trade exist.

Hoogovens directs the court's attention to the *Statement of Administrative Action accompanying the URAA*, H. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess. (1994) ("SAA"), as authority that absent any claim for adjustments for differences in levels of trade, a respondent bears no burden of proof as to what levels of trade exist. Interestingly, in support of the contrary conclusion, Commerce's rationale in the *Final Results* for placing the burden of proof on Hoogovens is also predicted on the very same SAA. Thus, Commerce explains:

Under the URAA, a level of trade adjustment can increase or decrease normal value. SAA at 159. Accordingly, the SSA directs Commerce to "*require evidence from the foreign producers that the functions performed by the sellers at the same level of trade in the U.S. and foreign markets are similar, and that different selling activities are actually performed at the allegedly different levels of trade.*" *Id.* \*\*\* Thus, to properly establish the LOT of the relevant sales, Commerce specifically requests LOT information in every antidumping proceeding conducted under the URAA, regardless of whether a respondent sells solely to one nominal customer category, such as service centers or end-users. Moreover, consistent with that approach, we note that of necessity, the burden is on a respondent to demonstrate that its categorizations of LOT are correct. Respondent must do so by demonstrating that selling functions for sales at allegedly the same level are substantially the same \*\*\*.

As a matter of policy, the Department cannot allow respondents to form their own conclusions on LOT [i.e., all sales are made at one level of trade] and then submit [only] the data to support their con-

clusions. *Rather, it is the Department's responsibility, not respondent's to determine LOTs.* It is not that respondents have the burden to "prove the negative," as Hoogovens states, but that respondents have a burden to demonstrate that there is only one LOT. We make no presumption as to the number of LOTs in a market. *Rather, the respondent must provide information which satisfactorily demonstrates what LOTs exist.* Respondent's failure in this case to provide detailed LOT information leads the Department to conclude that *it has not met its burden of proof to demonstrate that there is in fact only one LOT, particularly in light of other evidence indicating the existence of two LOTs.*

*Final Results* at 13206-07 (emphasis added). The court finds that Commerce's position is not contrary to law.

Commerce's determination with respect to levels of trade can significantly affect the calculation of the margin of dumping and thereby the amount of dumping duties assessed and cash deposits required. A respondent who, as here, seeks to minimize the margin of dumping by claiming that all sales were made at one level of trade, and vigorously pursues its claim in furtherance of that objective, presumably possesses the relevant level of trade information, and of necessity, must bear the burden to come forward with the necessary evidence to establish its claim. Nonetheless, as pointed out by Commerce, whether or not a respondent meets its burden of production or proves its claim, it is the agency's responsibility, not that of respondent, to determine what levels of trade exist. *Id.* at 13207. If, for whatever reason, respondent fails to submit all the requested information, Commerce must nevertheless proceed in its investigation with the evidence available to determine what levels of trade exist. In this case, Commerce determined that Hoogovens' had failed to submit the information required to sustain its burden of proof as to one level of trade, and determined that sales were made in both markets at two levels of trade.

## II.

COMMERCE'S FINAL RESULTS REQUIRE CLARIFICATION AS TO WHETHER ITS LEVEL OF TRADE DETERMINATION IS BASED ON EVIDENCE OF RECORD OR ON FACTS AVAILABLE IN ACCORDANCE WITH 19 U.S.C. § 1677e(a) AND § 1677m(d).

Defendant and the domestic steel producers argue that Hoogovens failed to provide full information, failed to adequately respond to the questionnaires and supplemental questionnaires, Hoogovens provided Commerce with contradictory information, and that since Hoogoven's responses were deficient and it was uncooperative, Commerce properly resorted to facts otherwise available pursuant to 19 U.S.C. § 1677e(a)(1) and (2) in compliance with § 1677m(d).

The evidence of record shows that Commerce requested information from Hoogovens through an original and two sets of supplemental questionnaires endeavoring to obtain sufficiently detailed information concerning Hoogovens' selling functions, channels of trade, etc. with respect to the two customer categories to whom Hoogovens made sales

in the home market and for export to the United States—service centers and end-users. The initial questionnaire requested information concerning, *inter alia*, specific differences and similarities in selling functions and/or support services in the home market and the United States related to each of its customer groups and how differences affected price comparability. Hoogovens responded that it “has determined that it cannot differentiate among the selling functions performed and services offered to different classes of home market or export price customers,” *Hoogovens’ Section A Response at 17, P.R. 17.*

Hoogovens continued to insist in its responses to the supplemental questionnaires that with respect to its two customer categories Hoogovens could not distinguish levels of trade for its export price and home market sales based on the selling functions performed by Hoogovens in connection with those sales, that all of its home market and export price sales used the same channels of distribution, that prices charged in each market did not vary depending upon the channel of distribution, and therefore, that all sales were made at the same level of trade in both markets.

Interestingly, Commerce preliminarily accepted Hoogovens’ submissions ostensibly as adequate responses, and initially determined there was one level of trade for all of Hoogovens’ sales. However, the preliminary determination, which agreed with Hoogovens claim, was strenuously objected to by the petitioners (domestic steel producers in this case) on the basis of certain information Hoogovens had submitted in the third review, which allegedly was contradictory to information submitted by Hoogovens to Commerce in the second administrative review. Petitioners insisted that Hoogovens’ information demonstrated there were two levels of trade in each market.

Specifically, in the third review domestic steel industry plaintiffs pointed to the fact that in the second administrative review Hoogovens initially claimed that it provided “much greater sales support” to its end-user customers than to its service center customers, indicative of different levels of trade, but subsequently reversed its position to claim there was only a single level of trade. Notwithstanding the foregoing circumstances, in the final results of the second review (and in the preliminary results of the third review, 62 Fed. Reg. at 47421) Commerce accepted Hoogovens’ claim there was a single level of trade.

However, following the preliminary results of the third review, and at the urging of the domestic steel producers, Commerce specifically asked Hoogovens to address the functions that it had previously identified in the second review indicative of different levels of trade, *Commerce’s Supplemental Questionnaire for Hoogovens* (December 13, 1996) at 1. However, notwithstanding the seemingly contradictory information submitted by Hoogovens in the second review focused on by the domestic steel producers in the third review, Hoogovens continued to insist in the third review that it could not differentiate between levels of trade

based on selling functions performed by Hoogovens with respect to its end-user and service center categories of customers.

In its *Final Results* at 13207, Commerce stated:

Respondent's failure in this case to provide detailed LOT [level of trade] information leads the Department to conclude that it has not met its burden of proof to demonstrate that there is in fact only one LOT, particularly in light of other information indicating the existence of two LOTs.

\* \* \* \* \*

In the present case, Hoogovens sold to end-users and service centers in both the U.S. and home markets. *It is undisputed that these transactions constitute sales through different channels of trade.*

With respect to the selling functions performed, we conducted a comprehensive examination of the available information provided by Hoogovens in this case. The Department requested information on selling functions in the original questionnaire and two supplemental questionnaires. *Based upon the information submitted on the record, we are unable to determine conclusively whether the specific selling functions performed by Hoogovens with respect to sales to the service centers and end-users reflect sales at the same LOT.*

\* \* \* \* \*

The statements and evidence Hoogovens has elected to place on the record indicate an ability to isolate data on selling functions and determine how they vary in kind and degree by customer category or end-use. *Despite that apparent ability, Hoogovens declined to provide all of the detailed information which the Department requested for purposes of conducting a LOT analysis.* As noted above, respondent's failure to provide detailed LOT information has left the Department with an inadequate record on this issue [of selling functions]. For example, the Department specifically requested that Hoogovens "describe in detail the nature and extent of the selling functions performed." \* \* \* The Department required that "[f]or each selling function, describe in detail whether it is performed to a greater degree, or in a different manner, depending on customer type." *Id.* By its own admission, Hoogovens performed varying levels of technical and quality assurance assistance. Nevertheless, Hoogovens did not provide the information necessary for the Department to make a proper evaluation of LOT and assess the assertions made by Hoogovens. Because Hoogovens has not provided an adequate explanation of the services it performs, nor demonstrated that variations in services supplied are not related to customer category, the Department is unable to assess the validity of Hoogovens' claim that it performs the same services for all customers in all markets.

Furthermore, other evidence on the record suggests that there are different selling functions performed based on the customer category in this case. \* \* \*

\* \* \* \* \*

Further, Hoogovens' responses appear contradictory. \* \* \*

\* \* \* \* \*

In sum, the *evidence on the record* demonstrates that, both in the home market and in the United States, sales occur at two different stages in the marketing process and to two different customer categories (i.e., service centers and end-users). Significantly, in this case, the Department has also determined that a pattern of consistent price differences exists with respect to sales occurring at these two different stages of marketing in the home country. In fact, *Hoogovens has acknowledged* that one primary factor governing prices charged to end-users and service centers is the "historic commercial reasons related to the relative functions of service centers and end-users. Therefore, on the basis of facts available we are treating EP and home market sales to end-users as a different LOT than home market sales to service centers. Further, since the basis for distinguishing LOT is the provision of technical and warranty services, and the LOT of the CEP sales is the LOT of the affiliated service centers, we are treating all CEP sales as sales to service centers and this LOT as equivalent to the home service center LOT.

*Id.* 13208 (emphasis added).

The *Final Results* are clear that Commerce found the evidence of record inadequate to sustain Hoogovens' claim all sales were made at *one level* of trade. Notwithstanding Hoogovens' failure to submit adequate evidence to sustain its claim with respect to a single level of trade, the court agrees with Commerce that it still had the responsibility to determine what levels of trade existed. Both defendant and domestic steel producers strenuously argue that in determining there were two levels of trade, Commerce pointed to substantial evidence of record there were two levels of trade, and also to "facts available." It is unclear, however, whether Commerce predicates its determination there were two levels of trade solely on all the available facts *of record*, or whether Commerce resorted, in whole or in part, to other facts available (not of record) pursuant § 1677e(a)(1) or (2). While, of course, it is arguable that Commerce may have resorted to facts otherwise available pursuant to the statute, significantly, the statutory authority is not referred to in the *Final Results*, and even more significantly, in the *Final Results* there is no specific analysis concerning, or finding by, Commerce as to whether Hoogovens' questionnaire responses, or any other conduct during the investigation, meets any of the specific criteria specified in § 1677e(a)(2), or whether Commerce complied with the prerequisite conditions specified in § 1677m(d) for invoking the authority to resort to "facts otherwise available." See *Borden, Inc.*, 4 F. Supp. 2d 1221, 1244 (CIT 1998).

The "facts available" statute, 19 U.S.C. § 1677e(a), provides that Commerce "shall, subject to section 1677m(d) \*\*\*, use the facts otherwise available in reaching the applicable determination" if "(1) necessary information is not available on the record, or" "(2) an interested party \*\*\* (A) withholds information that has been requested by the administering authority or the Commission \*\*\*." Defendant and the domestic plaintiffs contend that Commerce properly resorted to statutory facts available because necessary information was not available on the record

and Hoogovens withheld requested information. Hoogovens, however, claims that substantial evidence of record establishes its claim that all sales were made at one level of trade, denies that it withheld any requested information, and therefore, resort to other facts available was improper. Hoogovens further maintains that, in any event, Commerce failed to comply with the prerequisite conditions under § 1677m(d) for use of other facts available pursuant to § 1677e(a).

Specifically, Hoogovens posits that Commerce's resort to facts available was improperly predicated on the absence of information Commerce never requested. Continuing, Hoogovens contends that since Commerce failed to ask for the pertinent information it says is now lacking in the record, Hoogovens should not be held responsible for any deficiency in its responses to the questionnaires, citing *Queen's Flowers de Columbia v. United States*, 981 F. Supp. 617, 628-29 (CIT 1997) (citing *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572-75 (Fed. Cir. 1990), and *Helmerich & Payne v. United States*, 24 F. Supp. 2d 304 (CIT 1998), citing *Koyo Seiko Co. v. United States*, 92 F.3d 1162, 1165 (Fed. Cir. 1996). Hoogovens further maintains that Commerce failed to give proper weight to evidence that Hoogovens' expert visited all major customers in the United States in each customer category on a regular basis, and failed to treat as highly probative—indeed compelling—that Hoogovens performed essentially the same services for end-users and service center customers in the United States. Commerce, however, found that the evidence of the visits "not useful." *Final Results* at 13208.

Defendant, contends that Commerce made it clear to Hoogovens that it required further information, provided further opportunity to submit additional information, and provided Hoogovens with an opportunity to respond to the supplemental questionnaires, which satisfies the prerequisite conditions of § 1677m(d). Citing *Borden, Inc. v. United States*, *supra*, Hoogovens, however, insists there was no proper legal or factual basis under the statute for resort by Commerce to facts available pursuant to § 1677e(a)(1) or (2), and in any event, Commerce failed to comply with 19 U.S.C. § 1677m(d) by promptly providing Hoogovens with notice that its questionnaire responses were "deficient" and by providing Hoogovens with an opportunity to remedy or explain any specific deficiency.

Subsection 1677e(a) provides that the use of facts otherwise available shall be subject to § 1677m(d). *Borden*, 4 F. Supp. at 1244-45. Section 1677m, enacted as part of the Uruguay Round Agreements Act, Pub. L. 103-465, § 231, is "designed to prevent the unrestrained use of facts available as to a firm which makes its best effort to cooperate with [Commerce]." *Borden, Inc. v. United States*, 4 F. Supp. 2d at 1245. Pursuant to § 1677m(d), entitled "Deficient submissions," if Commerce determines that a response to a request for information does not comply with the request, the agency is required to inform the person submitting the response of the deficiency and permit that person an opportunity to remedy or explain the deficiency. If the remedial response or explanation

provided by the party is found to be "not satisfactory" or untimely, the information may be disregarded in favor of facts otherwise available, subject to compliance with the prerequisite conditions of § 1677m(d). However, under § 1677m(e) the agency may not decline to consider information that fails to meet the applicable requirements of the agency that is submitted by an interested party and is necessary to the determination if certain five part criteria of subsection (e) are met. *See Borden*, 4 F. Supp.2d at 1245 ("Subsection (e) may require use of the respondent's information notwithstanding that an explanation is unsatisfactory."). Significantly, however, there is no suggestion whatever in the *Final Results* that any of Hoogovens' responses were "disregarded" by Commerce in favor of facts otherwise available.

In addressing the level of trade issues, the *Final Results* are clear Commerce determined that Hoogovens had failed to prove its claim that sales were made at one level of trade, and are replete with references to evidence on the record that, according to defendant and domestic steel producers, constitute substantial evidence that Hoogovens' sales were made at two levels of trade rather than one. Nonetheless, the parties also point to the reference in the *Final Results* to the basis for the determination being "facts available," *Final Results* at 13208.

There is no clarification by Commerce as to whether such "facts available" refer to the available evidence of record alluded to by Commerce in its *Final Results*, or to resort to either or both § 1677e(a)(1) and (2). Commerce seemingly waffles between finding the record inadequate on the issue of selling functions and the lack of necessary information of record for a proper evaluation of level of trade, and also finding from the evidence of record that Hoogovens' sales were made at two different levels of trade. Thus, Commerce found from the evidence of record: Hoogovens' sales were made through different channels of trade; Hoogovens' made admissions that it performed varying levels of technical and quality assurance assistance with respect to its two customer categories; home market sales and export sales occur at two different stages in the marketing process; there was a pattern of consistent price differences with respect to sales occurring at the two different stages of marketing in the home country; and the "historic commercial reasons related to the relative functions of service centers and end-users. *Id.* at 13207-08. Thus, in view of the foregoing, it may well be that the absence of any reference in the *Final Results* to its statutory authority under § 1677a(e)(1) and (2) or compliance with § 1677m(d) was intentional because Commerce's use of the term "facts available" in the *Final Results* may simply have referred to the facts available of record.

The confusion concerning the evidentiary basis for Commerce's determination is further amplified by the contradictory and waffling arguments of counsel for defendant and the domestic steel producers. Thus, counsel for defendant and the domestic steel industry producers seek to support Commerce's determination that sales were made at two levels of trade on the basis of both the evidence of record pointed up by Com-

merce in the *Final Results* and "facts available" pursuant to § 1677e(a)(1) and (2) and § 1677m(d).

For example, defendant contends that "all of the *available, non-conflicting*, level of trade evidence demonstrated that Hoogovens' sales were made at two separate and distinct levels-of-trade." *Deft's Mem.* at 54 (emphasis added). However, defendant also posits that "Hoogovens' failure to provide detailed level of trade information left the *Department with an inadequate record on the issue*," *Mem.* at 19 (emphasis added), and therefore, "Commerce properly resorted to facts otherwise available." *Deft's Mem.* at 21. *See also, e.g., Deft's Mem.* at 20, 42, and 59.

Similarly the domestic steel industry producers advance statutory facts available as a basis for sustaining the level of trade determination, they also vigorously argue there is substantial evidence of record supporting Commerce's level of trade determination, including much of the same evidence of record cited by Commerce: Hoogovens' un rebutted contradictory initial submissions in the second administrative review indicating Hoogovens' greater sales support to end-user customers than to service centers; other admissions of record in the third review; product brochure representations; and consistent patterns of price differences between customer categories. *Domestic Plaintiffs' Mem. in Opposition to Hoogovens' Motion for Judgment on the Agency Record* at 17, 20-24, 31. As argued by the domestic steel producers, "based on the evidence of record, and consistent with the proper allocation of the burden of proof, the Department found evidence of two levels of trade in each market." *Domestic plaintiffs Mem. in Opp. To Hoogovens' Motion for Judgment on Agency Record* at 31.

A definitive disclosure by Commerce as to the precise evidentiary basis for each of its underlying factual findings leading to its determination there were two different levels of trade (*i.e.*, evidence of record—judicially reviewed pursuant to 19 U.S.C. § 1516a(b)(1) (B)(i))—and/or facts otherwise available pursuant to § 1677e(a)(1) or (2), or both, in compliance with the prerequisites under § 1677m(d)), is a critical threshold requirement for further review of the level of trade issues in this case.

While Government counsel and counsel for the domestic steel industry producers sought to support Commerce' level of trade determination on the basis of substantial evidence on the record buttressed by facts available pursuant to § 1677e(a), fundamentally, of course, a reviewing court must evaluate the validity of an agency decision on the basis of the reasoning presented in the decision itself. An agency determination "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order \* \* \*" *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). Nor may "post hoc rationalizations" of counsel supplement or supplant the rationale or reasoning of the agency. *FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974). *See also Hoogovens Staal BV*, 4 F. Supp.2d at 1219.

In light of the seemingly contradictory contentions of the parties and the considerable uncertainty left by the *Final Results*, the court remands to Commerce for clarification of the evidentiary basis for Commerce's factual determinations concerning level of trade. If Commerce's determination that Hoogovens' sales were made at two different levels of trade was based on the evidence of record, Commerce's remand results should so advise the court, with a summary of what evidence on the record Commerce relied on. If, however, Commerce relied on § 1677e(a)(1) or (2), in whole or in part, then in its remand results Commerce should so advise the court, along with a full disclosure of evidence demonstrating that Commerce has complied with the statutory prerequisite conditions under §§ 1677e(a)(1) and/or (2), and 1677m(d) for use of that authority. *see Borden*, 4 F. Supp. at 1286.

### III.

#### USE OF ADVERSE INFERENCES

If Commerce resorts to use of facts otherwise available pursuant to § 1677e(a), under § 1677e(b) Commerce, in selecting from among the facts otherwise available, may apply an adverse inference if it makes the additional finding that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." *See Borden*, 4 F. Supp. 2d at 1246. Hoogovens argues that Commerce erroneously found it to be uncooperative in responding to the questionnaires, and accordingly, erred in selecting from the facts "otherwise available" pursuant to § 1677e(a). Hoogovens further maintains that Commerce improperly invoked "adverse inferences" against Hoogovens under 19 U.S.C. § 1677e(b).

Clearly, in pointing out in the *Final Results* that "[d]espite [the] apparent ability [to more fully respond], Hoogovens declined to provide all of the detailed information which the Department requested for purposes of conducting its LOT analysis," *Id.* at 13207, Commerce implicitly (if not explicitly) made a finding pursuant to § 1677e(a)(2)(A) that Hoogovens withheld requested information, and also a finding pursuant to § 1677e(b) that Hoogovens "has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]." Nonetheless, defendant and the domestic steel industry producers, while insisting that Commerce relied on § 1677e(a), deny that Commerce used adverse inferences in making the level of trade determination pursuant to § 1677e(b). Significantly, even if the prerequisite conditions for the mandatory use of facts available in reaching the applicable determination pursuant to § 1677e(a)(1) or (2) and § 1677m(d) exist, the use of adverse inferences under § 1677e(b) is *permissive*, not mandatory. The *Final Results* make no reference whatever to § 1677e.

As previously stated, since counsel's *post hoc* rationale cannot be accepted by the court as the basis for the agency's determination, the *Final Results* require clarification as to whether, and the extent to which, if any, Commerce relied on § 1677e, either subsection (a) or (b), and the

facts of record demonstrating that Commerce met the prerequisite conditions.

#### IV.

##### COMMERCE'S ALLEGEDLY IMPROPER USE OF AGGREGATE INFORMATION IN MAKING FINDINGS AS TO SALES IN THE U.S. MARKET.

Hoogovens alleges that Commerce's level of trade determination is flawed because Commerce improperly utilized aggregated information, most of which applies only to the home market, to reach generalized conclusions regarding both markets. Thus, argues Hoogovens, because of its reliance on aggregated information, "Commerce's final determination contains virtually no analysis of Hoogovens' U.S. sales process." Hoogovens' Mem. at 30-31. In addressing the issue of levels of trade in its *Final Results* Commerce may not have articulated the findings applicable to U.S. sales with the precision and specificity that Hoogovens would have preferred. Nonetheless the court finds Commerce's analysis sufficiently clear that it covers Hoogovens' U.S. sales as well as home market sales. Therefore, Hoogovens' objection that Commerce's findings with respect to level of trade are deficient because they fail to address Hoogovens' sales in the U.S. market is without merit.

##### WARRANTY AND TECHNICAL SERVICE EXPENSES

In its *Final Results*, Commerce treated all of Hoogovens' technical service and warranty expenses as direct expenses in both the home market and U.S. market. 63 Fed. Reg. at 13205. Accordingly, in the *Final Results*, Commerce deducted from the U.S. market (export) price and home market (normal) price the amount of the warranty and technical service expenses incurred in the respective markets. *Final Results* at 13205.

Domestic steel producers challenge the *Final Results* on the ground that Hoogovens had unsegregated direct and indirect expenses which Commerce improperly treated as *all direct expenses* in the home market. Domestic steel producers, therefore, urge the court to remand with directions to treat warranty and technical service expenses as direct in the U.S. market and to deny an adjustment for such unsegregated expenses in the home market, which of course would result in increasing the margin of dumping.

Defendant admits "[u]pon review of the domestic producers' brief, Commerce may have erred in its treatment of technical service and warranty expenses in the home market." *Deft's Mem.* at 59, and requests a remand for reconsideration of the expenses in the home market.

Notwithstanding Commerce's admission of possible error in treating the expenses in question in the home market as direct expenses, Hoogovens contends that in its margin calculation, Commerce properly treated the expenses in both markets the same (*viz.*, as direct expenses) and opposes remand. Specifically, Hoogovens asserts: (1) Commerce is not automatically entitled to a remand simply because it so requests; and (2) defendant failed to articulate any reasoned basis why Commerce should be allowed to reconsider its decision.

Fundamentally, of course, "[a] request by Commerce for a remand does not control the court." *Timken Co. v. United States*, 989 F. Supp. 234, 243 (CIT 1997). Hoogovens is correct that defendant did not explicitly concede error or specifically disclose any factual basis justifying remand, but Commerce did point to the arguments raised in the domestic steel producers' brief as the basis for concession of possible error and its request for remand. Domestic steel producers' brief spells out the nature of the alleged error in Commerce's treatment of Hoogovens' warranty and technical service expenses as all direct home market expenses. However, at this juncture the Government, understandably, does not wish to take a definitive position with respect to domestic producers' contentions without further agency review.

The court is sufficiently clear as to the nature of the issues related to the home market warranty and technical service expenses that Commerce would address if the *Final Results* were remanded for reconsideration since defendant's admission of possible error is expressly based on the contentions raised by the domestic steel producers. Therefore, there is a sufficiently specific basis for remand so that Commerce may first reconsider the matter before the court further reviews the issues related to the treatment of home market warranty and technical service expenses as direct expenses.

The *Final Results* are remanded to Commerce for reconsideration of its treatment of the home market warranty and technical service expenses as direct expenses.

#### CONCLUSION

For the forgoing reasons, IT IS HEREBY ORDERED THAT the *Final Results* are remanded to Commerce for further proceedings consistent with this opinion.

FURTHER ORDERED: Commerce's *Remand Results* shall be filed with the Clerk of the court within ninety (90) days of the date of this decision. Plaintiffs may respond to the *Remand Results* within thirty (30) days from the date of filing the results with the court; defendant shall have thirty (30) days from the filing of plaintiffs' briefs to respond. Any reply brief by plaintiffs is due within twenty (20) days of the filing of the brief to which a plaintiff is replying.

(Slip Op. 00-9)

THOM S. ZANI D/B/A WHOLESALE ART & FRAME LTD., PLAINTIFF v.  
UNITED STATES, DEFENDANT

Court No. 95-07-00907

[Defendant's motion *in limine* granted in part.]

(Dated January 31, 2000)

*Peter S. Herrick and Neil B. Mooney, Esqs. for plaintiff.**David W. Ogden, Acting Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office (Amy M. Rubin), Commercial Litigation Branch, Civil Division, U.S. Department of Justice.*

## OPINION AND ORDER

## BACKGROUND

WATSON, *Senior Judge*: This classification action under 28 U.S.C. § 1581(a) is currently before the court on remand by the Federal Circuit for a trial on the merits. *Thom S. Zani d/b/a Wholesale Art & Frame Ltd. v. United States*, Appeal No. 97-1115, 1998 WL 729247 (Fed. Cir. October 16, 1998). Defendant has moved *in limine* to exclude certain exhibits and testimony plaintiff proposes to submit at trial, as set forth in the parties' joint pretrial order.

Briefly, the background of the current motion is as follows.

The merchandise at issue, certain paintings imported by plaintiff from Hong Kong and Korea, was classified by the United States Customs Service ("Customs") under the provision for "[o]ther made up articles: \* \* \* Other" in subheading 6307.90.99 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Plaintiff, an importer and distributor of paintings and frames, claims that the merchandise is properly free of duty under the provision in subheading 9701.10.00, HTSUS, for "Paintings, drawings, and pastels, executed entirely by hand." On the merits, the issue revolves around whether the imports were "executed entirely by hand," as claimed by Zani.

This court granted summary judgment to defendant sustaining Customs' classification. *Zani v. United States*, 976 F.Supp. 1033 (CIT 1997). On appeal, the Federal Circuit vacated this court's grant of summary judgment and remanded for a trial to resolve disputed issues of fact, including the reliability of Customs laboratory test. Specifically, the Federal Circuit remanded the case "[b]ecause there are genuine issues of fact to be resolved, including the adequacy of the Customs Service's sampling of the paintings imported by Mr. Zani, the reliability of the Customs Service's laboratory report regarding the sampled paintings, and the exact nature of the methods used in producing the paintings at issue, and because there is an open question as to the meaning of the term "stencil" in relation to subheading 9701.10.00 of the HTSUS." *Zani, supra*.

As previously directed by the court, on January 20, 2000, the parties submitted their proposed joint pre-trial order, and based upon the order it appears that the positions of the parties are as follows.

Defendant insists that the imports are classifiable under subheading 6307.90.00, HTSUS, rather than subheading 9701.10.00 because they were not "executed entirely by hand," based upon laboratory testing and a report by the Customs laboratory in Savannah, Georgia dated January 19, 1994, that three sample paintings tested were produced with the use of a stencil. The joint pretrial order, Schedules E-2 and F-2, further discloses that the Government is relying on the presumption of correctness attaching to the classification of the merchandise, and specifically on "the presumptively correct determination by the Customs Service [laboratory] that the imported merchandise was not "executed entirely by hand." Further, defendant contends that plaintiff has the burden of overcoming the presumption of correctness.

Plaintiff contends that the evidence at trial will show that Customs' testing and laboratory report are unreliable because the samples tested were not representative of the subject merchandise<sup>1</sup> and the tests fail under the admissibility factors for the use of "scientific, technical, or other specialized knowledge" at trial in *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).<sup>2</sup> Finally, plaintiff posits that the "stencils" referred to in the Explanatory Notes to the HTSUS are the type that are used in a mechanized system of manufacturing machine-produced painted or silk-screened articles, while plaintiff's artists occasionally use a single hand-held stencil when painting, which is not contemplated by the Explanatory Notes, but leaves the artwork "executed entirely by hand" within the purview of subheading 9701.10.00.

Based upon the joint pretrial order listing the evidence the parties intend to offer at trial, defendant has moved *in limine* to exclude certain testimony and exhibits plaintiff intends to present. Specifically, Schedule G-1 of the pretrial order discloses that plaintiff will, in addition to his own testimony, call as an expert witness, Wanda Barney, a commercial artist residing in Boca Raton, Florida. Additionally, Schedule H-1 of the joint pretrial order lists as plaintiff's exhibits to be offered in evidence at

<sup>1</sup> Plaintiff asserts that the samples tested by Customs' laboratory were taken from an unidentified entry and are not representative of the subject merchandise.

<sup>2</sup> Customs' official laboratory reports must be transmitted to the clerk of the court by Customs in accordance with 28 U.S.C. § 2635(a) and CIT Rule 70, whether or not in dispute, and under Rule 70 are automatically "part of the official record of the civil action," notwithstanding *de novo* review in classification cases pursuant to 28 U.S.C. § 2640(a). Moreover, under CIT Rule 70 disputed Customs laboratory reports are part of the official record of the civil action whether or not the report would be admissible under the *Daubert* factors and Federal Rules of Evidence. Thus, in this case the hotly disputed issues concerning whether the Customs laboratory's samples were representative of the imported merchandise and whether Customs' tests even meet the *Daubert* factors, cannot be addressed to the court as "gatekeeper" on the issue of admissibility of scientific evidence under the Federal Rules of Evidence, but only as to the reliability of Customs' testing, and the weight to be accorded to the laboratory report. See *Libas, Ltd. v. United States*, 193 F.3d 1361 (Fed. Cir. Oct. 7, 1999), citing *Daubert* and *Kumho Tire Co. Ltd. v. Carmichael*, 119 S. Ct. 1167 (1999).

In *Libas*, the Federal Circuit held that since the laboratory report in question was part of the "official record" in accordance with 28 U.S.C. § 2635(a), the admissibility of the laboratory report was not (and could not be) challenged at trial under the Federal Rules of Evidence. Nonetheless, the Federal Circuit held that the proposition for which *Daubert* and *Kumho* stands is that the reliability of expert testimony and scientific tests goes to the weight that evidence is to be accorded as well as to admissibility. The Federal Circuit noted that although at trial, *Libas* did not raise a *Daubert* attack as such (i.e., admissibility), "*Libas*' argument at trial against the reliability of the test was sufficient to rebut the statutory presumption of correctness accorded to Customs classifications." *Libas* at n.2.

trial: the stencil allegedly used by the Hong Kong artist's studio from which Zani purchased paintings; an affidavit of Fred W. Scholle, plaintiff's Hong Kong supplier, dated April 26, 1994; and an affidavit of Jorge Vallina, Professor of Art, University of Miami, dated April 28, 1994. The foregoing affidavits were among the papers previously submitted by plaintiff to the court in connection with the motion for summary judgment.

For the reasons that follow, defendant's motion is granted in part.

#### DISCUSSION

Defendant's motion *in limine* raises certain pretrial evidentiary issues aimed at the exclusion of much of plaintiff's proposed trial evidence. Specifically, defendant seeks to now exclude *in limine*: (1) the testimony of plaintiff's expert witness Wanda Barney; (2) the stencil; and (3) the two affidavits that plaintiff intends to offer at trial.

#### I.

##### PLAINTIFF'S EXPERT WITNESS WANDA BARNEY

The joint pretrial order lists Ms. Wanda Barney, a commercial artist residing in Boca Raton, Florida, as an expert witness. Defendant seeks to exclude Ms. Barney's testimony on the ground the witness was not previously listed or identified by plaintiff in response to defendant's interrogatories requesting the identities of witnesses to be called at trial, and was not identified as an expert witness until the joint pretrial order was filed.

The court agrees with defendant that as soon as Ms. Barney was retained by plaintiff as an expert witness to testify at trial, in light of the prior interrogatories plaintiff should have promptly informed defendant that plaintiff intended to use Ms. Barney at trial. See CIT Rules 26(b)(4)(A)(i), 26(e). However, the court sees no prejudice to defendant if defendant is permitted to depose the witness prior to trial.

Hence, in order to avoid possible prejudice to defendant's trial preparation, and specifically, to defendant's rights of discovery in connection with expert witnesses pursuant to CIT Rule 26(b)(4), defendant's request, in the alternative, to depose Ms. Barney is granted, but defendant shall pay a reasonable expert witness fee, as provided in CIT Rule 26(b)(4)(C), and also pay all costs, charges and expenses incident to taking the deposition as provided in CIT Rule 26(h). Such deposition may be taken in conformity with a written stipulation of the parties pursuant to CIT Rule 29, or otherwise in accordance with the rules of the court, but no later than March 1, 2000.

#### II.

##### PLAINTIFF'S STENCIL EXHIBIT

Defendant claims in the joint pretrial order that the Savannah Customs laboratory report listed by defendant in the joint pretrial order indicates that a "mechanical device (a stencil)" was used in the production of the paintings at issue. Plaintiff contends in the joint pretrial order

that use of a hand-held type of "stencil" in producing a painting does not disqualify the painting as "executed entirely by hand" within the purview of subheading 9701.10.00, HTUS, and that at trial plaintiff will offer as an exhibit "a highly relevant actual stencil from his supplier," Pltf's Opp. Mem. at 2.

Plaintiff states that he intends to authenticate the stencil exhibit at trial by his own testimony and certain documents, addressed *infra*. Defendant, however, seeks pretrial exclusion from evidence of the stencil exhibit on the ground that Mr. Zani will not be able to testify at trial from personal knowledge that the stencil is what plaintiff claims it is—the actual stencil used by plaintiff's supplier to create the paintings. Therefore, argues defendant, the proffered stencil cannot possibly be authenticated as required by Fed. R. Evid. 901, and therefore, the proposed exhibit is inadmissible.

In its memorandum in support of the current motion, at 2, defendant makes reference to certain aspects of its pretrial discovery, *viz.*, a deposition and answers to interrogatories of Mr. Zani. The deposition and answers by Mr. Zani while part of defendant's discovery materials that may be available for use at trial under the rules of evidence, are not now before the court at this pretrial juncture in support of defendant's motion *in limine*.

In ruling on defendant's motion *in limine*, the court will not speculate on or attempt to predict whether or not Mr. Zani's testimony at trial will properly authenticate the proposed exhibit based on the witness' personal knowledge as the actual stencil used by the supplier's artist to produce the paintings. A motion *in limine* to obtain pretrial evidentiary rulings as to the admissibility of evidence is unquestionably a valuable tool for litigants, if appropriately used, and may assist both the parties' trial preparation and narrow the evidentiary issues for the court. Nonetheless, pretrial rulings on a motion *in limine* must be approached with extreme caution when, as here, evidence that may otherwise be admissible is sought to be excluded prior to trial simply on the basis that a proper foundation for its admission, such as authentication of an exhibit through the testimony of a witness, cannot be adduced at trial.

The short of the matter is that the court simply cannot now make a pretrial ruling as to whether Zani's trial testimony will or will not properly authenticate the stencil exhibit in accordance with Fed. R. Evid. 901. That ruling must await what happens at trial.

Defendant further maintains that the stencil exhibit should be excluded at trial because during discovery plaintiff failed to provide defendant with a requested detailed description of the stencil used to create the paintings and the manner in which they were used, or even a photograph. With respect to defendant's alleged difficulties in obtaining requested information from plaintiff during discovery, the court must consider that defendant failed to pursue its remedies under CIT Rule 37, and is now somewhat belatedly raising discovery compliance issues in support of its motion *in limine*.

Plaintiff further states that in addition to his testimony at trial to authenticate the stencil exhibit, he will produce certain correspondence from the supplier and the original shipping envelope, in which the stencil arrived from Asia. However, the admissibility of the supplier's correspondence and shipping envelope for the truth of any statements contained therein are subject to the hearsay rule, see Fed. R. Evid. 801(c), and no exception to that rule has been urged by plaintiff. Plaintiff shall not be permitted to offer into evidence at trial the correspondence and shipping envelope for the truth of any statements therein.

In sum, as the court cannot at this juncture rule on whether Mr. Zani's testimony can properly authenticate the stencil exhibit, defendant's motion *in limine* to exclude the stencil for lack of authentication is denied. However, at least thirty (30) days prior the scheduled trial date, Mr. Zani is directed to supplement his responses to defendant's discovery requests by providing defendant with a detailed narrative description of the stencil to be offered at trial, and the manner in which it was allegedly used to create the imports, if based on his personal observations and knowledge. See CIT Rule 26(e)(3).

### III.

#### PLAINTIFF'S AFFIDAVIT EVIDENCE

Plaintiff's argument that the court should admit the hearsay affidavits of Scholle and Vallina at trial since they were previously submitted by plaintiff in opposition to the Government's motion for summary judgment, and because the affiants are not available for testimony at trial is frivolous. Unfortunately, the witnesses now unavailable to testify at trial were not deposed. See CIT Rule 32(a)(3). Affidavits while expressly proper for consideration on a motion for summary judgment under CIT Rule 56, other motions pursuant to CIT Rules 43(c) and 59(c), or when the value of merchandise is at issue, pursuant to 28 U.S.C. § 2639(c) and CIT Rule 43(e), are not necessarily admissible into evidence at a trial on the merits to resolve disputed issues of fact in a classification case.<sup>3</sup>

#### *Affidavit of Fred W. Scholle.*

The Scholle affidavit in question, dated April 26, 1994, executed nearly six years ago, is objected to by defendant on the grounds that it is not self-authenticating pursuant to Fed. R. Evid. 902, and constitutes inadmissible hearsay. The authentication question aside, even if authenticated, the affidavit of Fred W. Scholle clearly is hearsay as defined by Fed. R. Evid. 801(c) and inadmissible at trial, unless subject to one of the hearsay rule exceptions.

Recognizing that the affidavit is hearsay, plaintiff urges that at trial he will offer the Scholle affidavit under the business record exception in

<sup>3</sup> Recognizing that the testimony of certain witnesses may practicably be available only by deposition or affidavit, particularly witnesses residing abroad, and that the admission of depositions and affidavits of a witness is very restricted under the rules of evidence, Congress permitted the depositions and affidavits of persons whose attendance cannot reasonably be had to be admitted into evidence in cases where the value of merchandise is in issue. See 28 U.S.C. § 2639(c)(1). This action being a classification case rather than a value case, the foregoing statute is inapplicable, and the admissibility of affidavits is governed by the Federal Rules of Evidence.

Fed. R. Evid. 803(6). Admittedly, however, the affidavit in question was simply one of a series of "protestations" to Customs' classification decision tendered to plaintiff to support his classification claim at Customs. Plainly, the affidavit was not a record kept by the supplier in the regular course of the supplier's regularly conducted business of selling paintings and frames within the purview of Fed. R. of Evid. 803(6).

Plaintiff's further contention that the affidavit should be received in evidence under the residual exception of Rule 807 is also patently without merit. The Scholle affidavit is excluded from evidence at trial.

#### *Affidavit of Professor Jorge Vallina*

Recognizing that the affidavit is hearsay, plaintiff argues that the Vallina affidavit should be admitted into evidence under Rule 807, the residual exception, because the witness is no longer available to testify at trial, and it expresses his expert opinion as a Professor of Art. The witness was never deposed. Defendant opposes the admission into evidence of Vallina's affidavit because it is hearsay, prepared solely for purposes of litigation, and also because the expert witness was not identified by plaintiff in response to defendant's interrogatories until the filing of the joint pretrial order.

The affidavit must be excluded under the hearsay rule and does not fall within the exception of Rule 807.

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(Slip Op. 00-10)

HEARTLAND BY-PRODUCTS, INC., PLAINTIFF v. UNITED STATES OF AMERICA,  
DEFENDANT, AND UNITED STATES BEET SUGAR ASSOCIATION, DEFENDANT-  
INTERVENOR

Court No. 99-09-00590

[Motions for Reconsideration and Amendment denied.]

(Decided February 1, 2000)

*Mayer, Brown & Platt (Simeon M. Kriesberg, Kathryn Schaefer, Andrew A. Nicely), and Serko & Simon (David Serko, Daniel J. Gluck) for Plaintiff.*

*David W. Ogden, Acting Assistant Attorney General; Joseph I. Liebman, Attorney-in-Charge, International Trade Field Office; Commercial Litigation Branch, Civil Division, Department of Justice (Aimee Lee); Karen P. Binder, Office of Assistant Chief Counsel, International Trade Litigation, Customs Service, (Yelena Slepak) and Allan Martin, Associate Chief Counsel, Customs Service, (Ellen Daly), of counsel, for Defendant.*

*Wilmer, Cutler & Pickering (Lewis J. Liman, Robert C. Cassidy, Jr., Deirdre A. McDonnell), for Defendant-Intervenor.*

## OPINION

### I. INTRODUCTION

BARZILAY, *Judge*: This matter is before the Court pursuant to Defendant and Defendant-Intervenor's USCIT R. 59 Motion for Reconsidera-

tion. Defendant and Defendant-Intervenor ("Movants") desire the Court to reverse its judgment issued with Slip Opinion 99-110, dated October 19, 1999, familiarity with which is presumed. For the reasons stated herein, the motion is denied and the original judgment is affirmed in all respects.

## II. BACKGROUND

In Slip Op. 99-110, the Court held that the decision of the Customs Service to revoke New York Ruling Letter 810328 was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. In addition, the Court held that the correct classification of Plaintiff's product was under subheading 1702.90.40 HTSUS. Movants request reconsideration on two grounds: first, that the entire agency record was not before the Court at the time it rendered its decision; and second, that the appropriate remedy was remand to the agency.<sup>1</sup>

## III. STANDARD OF REVIEW

It is settled law that the disposition of a motion for reconsideration and/or rehearing lies within the sound discretion of the court. See *Asociacion Colombiana de Exportadores de Flores v. United States*, 19 F. Supp.2d 1116, 1118 (CIT 1998) (and cases cited therein). Furthermore, a rehearing is not granted to allow a losing party to relitigate the case, but rather to address a fundamental or significant flaw in the original proceeding. See *id.* A decision will not be disturbed unless it is manifestly erroneous. See *id.*

## IV. DISCUSSION

### A. There Was No Fundamental or Significant Flaw in the Original Proceeding.

Movants claim that the expedited nature of the original proceeding deprived them of the ability to place the entire administrative record before the court.<sup>2</sup> Defendant-Intervenor claims that it did not have an opportunity to participate in the scheduling, while the Defendant maintains that portions of the briefing schedule were achieved through duress. On September 22, 1999, the Court held a hearing on the briefing schedule proposed by Plaintiff. In part due to the Defendant's late filing,<sup>3</sup> a recess was taken and the parties were directed to consult and attempt to reach an agreement on a briefing schedule. When the hearing reconvened, the parties informed the Court that a mutually satisfactory

<sup>1</sup> While the Defendant declined to join Defendant-Intervenor's points regarding the necessity of the complete agency record and its advocacy of remand to the agency, see *Def.'s Mot. for Reh'g, Recons. and/or Amendment of Findings of Fact* at n. 5 ("Def.'s Br."), it supports those arguments by Defendant-Intervenor which raise material points of mistake of law or facts that Defendant-Intervenor claims occurred in the Court's opinion. See *Def.'s Br.* at 4. Alternatively, the Defendant moves for amendment of certain factual findings pursuant to USCIT R. 52.

<sup>2</sup> Defendant-Intervenor also claims that the nature of the administrative proceedings precluded its full participation. The Movants' arguments regarding the inability to place material before the agency are wholly unavailing. Defendant-Intervenor's petition began the revocation proceedings, which were noticed and opened to comments. Defendant's contention, that as a matter of administrative law the proceeding was informal, is irrelevant. See *Def.'s Reply Mem. to Pl.'s Resp. to Def.'s Mot. for Reh'g, Recons. and/or Amendment of Findings of Fact* at 9 ("Def.'s Reply"). Defendant-Intervenor had the opportunity to place material before the agency prior to the agency's decision and did so. See, e.g., AR(I) 1, 10; AR(II) 63; AR(V) 1.

<sup>3</sup> Defendant filed a proposed briefing schedule a few minutes prior to the commencement of the hearing.

briefing schedule had been achieved. Defendant-Intervenor's main complaint about the expedited time frame was that it did not have access to the certified administrative record until October 4, 1999 and therefore, could not place the entire administrative record before the court. Yet, the Defendant-Intervenor's opposition brief contained thirty-five annexes, almost all from the administrative record. Defendant placed approximately twenty-one exhibits in its annexes, for a combined total of fifty-six. While neither Defendant nor Defendant-Intervenor placed the entire administrative record before the Court, it is evident that Defendant-Intervenor had access to it and was able to bring to the Court's attention ample portions it believed were most supportive of its case.<sup>4</sup> See also discussion, *infra* Part IV.B.

Defendant's claim of duress also fails to persuade the Court that a fundamental or significant flaw existed in the original proceeding. While the Defendant represents that it consented to portions of the briefing schedule out of duress, Defendant's proposed briefing schedule belies this contention, notwithstanding the Defendant's claim to the contrary. See *Def.'s Reply* at 6 n.9. Accordingly, although the original proceeding was expedited, Movants have not pointed to a fundamental or significant flaw warranting rehearing.

#### *B. Nothing in the Court's Decision Was Manifestly Erroneous.*

Defendant-Intervenor contends that the Court's decision was manifestly erroneous because it did not have the entire agency record before it. On October 4, pursuant to the terms of the scheduling order, the Defendant filed a certified index of the administrative record. Additionally, Defendant filed an annex containing those portions of the record that it believed supported the agency's decision. Defendant-Intervenor also filed an annex with documents from the agency record. Prior to the Defendant and Defendant-Intervenor's filings, Plaintiff submitted an annex containing numerous record documents, which the Court later cross-referenced to the certified index of the agency record.

On the basis of the record placed before it by the parties, the Court was able to decide the case. In essence, this is a case that does not involve a dispute over the facts, but over the law applied to them.<sup>5</sup> As discussed at length in the Court's opinion, Customs turned a blind eye to the controlling legal precedent that an importer has the right to fashion merchandise to obtain the lowest rate of duty. Ignoring that established bedrock of Customs jurisprudence rendered its conclusions arbitrary, capricious, an abuse of discretion and not in accordance with law. The Court is satisfied, based upon its review of the additional portions of the record cited by the parties in this motion, that the record before it when it issued its

<sup>4</sup> Similarly, Defendant-Intervenor claims that the Court notified the parties it would not accept any further written submissions, and therefore placing the entire administrative record before the court would have been unacceptable. First, nine days elapsed between the established time to designate the agency record and the Court's notice to the parties. Second, it is difficult to see how the Defendant-Intervenor thinks the agency record would have been considered an additional written material in this context: "[The Court has] reviewed the written submissions and [is] satisfied that all relevant issues have been briefed adequately by both sides. Therefore, under the terms of the order issued September 24, 1999, no further written material will be accepted." Letter from Court to Counsel of 10/13/99.

<sup>5</sup> See, e.g., AR(VI) 122.

opinion contained the essential facts concerning Heartland's sugar syrup. As discussed in the opinion, Customs is required to classify merchandise according to the applicable law. In that regard, Customs does not act as a policymaker but in an adjudicative capacity. Once the Court had the essential facts before it, the remainder of its task was to review the law and to determine whether Customs acted in accordance with it.

Moreover, while Defendant-Intervenor claims that the Administrative Procedure Act ("APA") mandates review of the entire agency record, a review of the statute and caselaw contradicts the Defendant-Intervenor's position.<sup>6</sup> Section 706 of the APA provides that in deciding whether an agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, "the court shall review the whole record or those parts of it cited by a party \* \* \*." 5 U.S.C. § 706 (1994) (emphasis added). The reason for this seems rather straightforward. In an adversarial system, where review of a lengthy, multi-volume administrative record is necessitated, the parties that participated in the proceedings before the agency are in a better position than the court to highlight those portions of the record supporting their position. While the APA provides that a court must review the whole record, it allows the court to rely upon the portions of the record designated by the parties to be essential. The present case does not involve a request to supplement the record with material that the agency considered but did not designate as part of the record. Thus, it was not error for the Court to render judgment on the basis of the record placed before it by the parties.<sup>7</sup>

Accompanying its motion for reconsideration, Defendant-Intervenor provided three expert declarations about sugar refining operations. Since these were not part of the administrative record they cannot form a basis for upholding the agency's decision.<sup>8</sup> Nor do they persuade the Court in the limited sense for which they may be considered that an error of fact or law was committed. Defendant-Intervenor contends that the Court committed a manifest error of fact by stating that Congress did not intend to exclude all competing sugar products from entry under quotas by citing several sweetening products that enter without being

<sup>6</sup> Not a single case that Defendant-Intervenor cites contravenes the principle that a court may rely upon the parts of the record cited by the parties. Rather, the cited cases discuss when supplementing the record with material not designated as part of the record by the agency is appropriate. See *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548-49 (9th Cir. 1993); *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989); *Natural Resources Defense Counsel v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975); *Miami Nation of Indians v. Babbitt*, 979 F. Supp. 771, 775-79 (N.D. Ind. 1996); *Lloyd v. Illinois Reg'l Transp. Auth.*, 548 F. Supp. 575, 590 (N.D. Ill. 1982).

<sup>7</sup> The Court has reviewed carefully the additional documents Defendant-Intervenor claims render Customs' decision proper. However, none of the record documents cited convince the Court that it committed a manifest error in the original decision. Indeed, Defendant-Intervenor's reliance on an August 5, 1998, electronic mail message from the Customs Service's independent chemist undercuts its position. The chemist noted that "[o]ur position [I] is still that the product in issue is a 'sham product' made with the sole intent of circumventing quotas but we truly don't know where we could classify it, other than 1702.90.40." AR(VI) 114 at 2, AR(VI) 159 at 2. The chemist further states that "we support 100% the classification provided by the NIS [national import specialist]. Chemical analyses support classification in heading 1702.90.40." AR(VI) 159 at 1. In an undated faxed document, which seems to be about a year later, the same chemist concludes that classifying Heartland's product in an HTSUS provision subject to quota is correct. AR(VI) 122. As mentioned, *supra*, this document is a legal characterization of the facts.

<sup>8</sup> This point is uncontested. See *Def.-Intervenor's Reply Mem. in Supp. of its Mot. for Recons. of the Ct's J. of Oct. 19, 1999* at 27.

subject to quota. *See Slip Op. 99-110*, at 21. In a misreading of the opinion,<sup>9</sup> Defendant-Intervenor claims the Court found that lactose syrup, unblended glucose syrups, unblended fructose syrups, invert molasses, chemically pure fructose syrups and certain cane or other molasses were products that compete with sugar. However, the court made no such finding.

In the first sentence of the paragraph at issue, the Court noted that subheadings 1703.10.30 HTSUS and 1703.90.30 HTSUS allow products that compete with sugar to enter without being subject to quantitative restriction.<sup>10</sup> *Slip Op.* at 20. The second sentence of the paragraph refers to the various syrups listed above and merely refers to them as sugar products not subject to TRQs. The third sentence notes that "Congress did not intend to exclude all competing sugar products from entry without quantitative limitations." *Slip Op.* at 21. A careful reading of the portion of the Court's opinion at issue demonstrates that it was the first sentence, and that sentence only, to which this statement applied. The next and final sentence of the paragraph refers to the various syrups by saying that the HTSUS treats sugar products in a fundamentally different way from prior tariff law. *See Slip Op.* at 21. Thus, no error was committed. The court found only that subheadings 1703.10.30 and 1703.90.30 HTSUS are provisions that allow products that compete with sugar to enter without quantitative limitations.<sup>11</sup>

Finally, the Movants argue that the court exceeded its authority by declaring that Plaintiff's sugar syrup was correctly classified under subheading 1702.90.40 HTSUS. Defendant posits that the role of the court is limited to declaring the agency's revocation of NYRL 810328 published at 33 Cust. Bull. No. 35/36 at 41-54 (Sept. 8, 1999), including its attached HQ 961273, to be unlawful and invalid. The Court does not agree. Although the statute limits review of the agency decision to the administrative record, *see* 28 U.S.C. § 2640(e) (incorporating 5 U.S.C. § 706), and limits to declaratory the relief which can be granted, *see* 28 U.S.C. § 2643(c)(4), it vests discretion in the court to determine the appropriate relief. *See id.* Under the facts and circumstances of this case, it was appropriate to declare the correct classification of the merchandise at issue as it was Customs' illegal classification decision that was the basis for holding the revocation unlawful and invalid.

<sup>9</sup> Indeed this point is misstated in the Defendant-Intervenor's brief which reads: "Second the Court found that other 'competing sugar products,' such as lactose syrup, unblended glucose syrup, unblended fructose syrup and invert molasses, are not subject to the TRQ." *Def-Intervenor's Mem. in Supp. of Reh'g* at 32 (emphasis added). The opportunistic addition of "competing sugar products" significantly distorts the context and meaning of the sentence.

<sup>10</sup> Defendant-Intervenor does not dispute that these provisions which allow the import of molasses for the commercial extraction of sugar are not subject to quota.

<sup>11</sup> The court provided additional reasons, which are not challenged here, for its determination that a clear legislative intent to exclude the sugar syrup at issue did not exist. *See Slip Op.* at 21-22.

## V. CONCLUSION

For the foregoing reasons, the Court concludes that neither a fundamental or a significant flaw occurred in the original proceeding, nor did the court commit a manifest error of law or fact. Accordingly, the Court will enter an order denying the motion for reconsideration and the Defendant's additional and alternative USCIT R. 52 motion to amend.

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(Slip Op. 00-11)

LTV STEEL CO., ET AL., PLAINTIFFS v. UNITED STATES, DEFENDANT, AND  
TYSSEN STAHL AG, ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 93-09-00568

(Dated February 1, 2000)

## ORDER

CARMAN, *Chief Judge*: On April 12, 1999, the United States Court of Appeals for the Federal Circuit filed an opinion and entered judgment affirming in part the judgment of this Court in *British Steel plc v. United States*, 936 F. Supp. 1053 (C.I.T. 1996), and remanding it in part for further proceedings. On July 30, 1999, to implement the decision of the Federal Circuit, this Court issued a remand order to the U.S. Department of Commerce ("Commerce"), with the consent of the parties, containing the following terms:

[I]t is hereby

ORDERED that this matter is remanded to the Department of Commerce for the recalculation of repayment based upon (1) the use of purchase price paid for Saargestahl SVK, and (2) the net worth of Saargestahl SVK; and it is further

ORDERED that the parties shall be allowed to submit an English-language translation of the financial statements already on the record for use in determining the net worth of Saargestahl SVK, as well as a written explanation of how net worth can be calculated from such financial statements.

Pursuant to the consent order, Commerce made a redetermination and transmitted the results (the "Redetermination Results") to this Court on November 5, 1999.

Accordingly, the Court having reviewed the Redetermination Results, the record supporting the Redetermination Results, and the materials that have been filed by the parties, and Commerce having complied with the Court's remand order, it is hereby:

ORDERED, that the Redetermination Results issued by Commerce are hereby affirmed; and

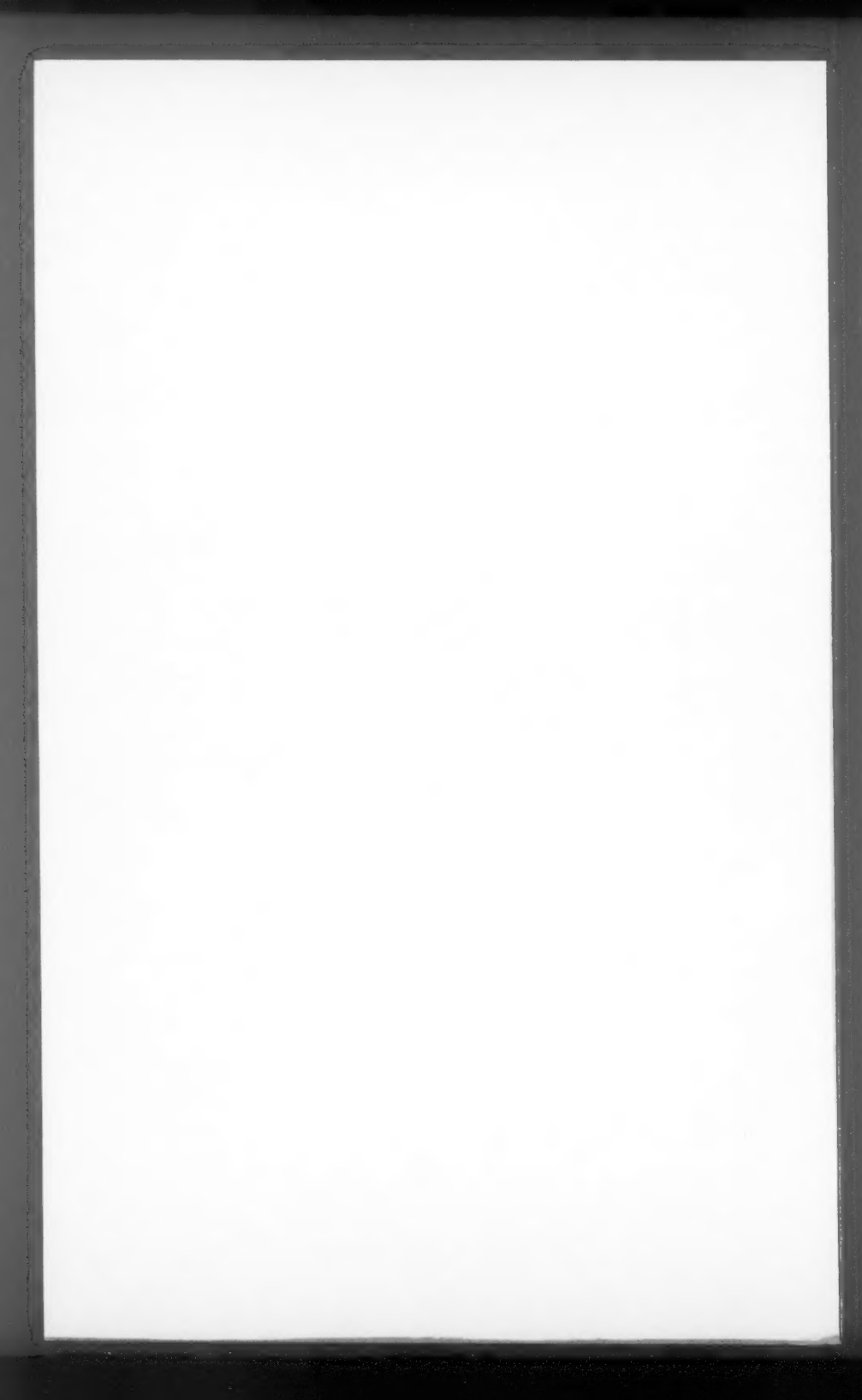
ORDERED, that the case is dismissed.

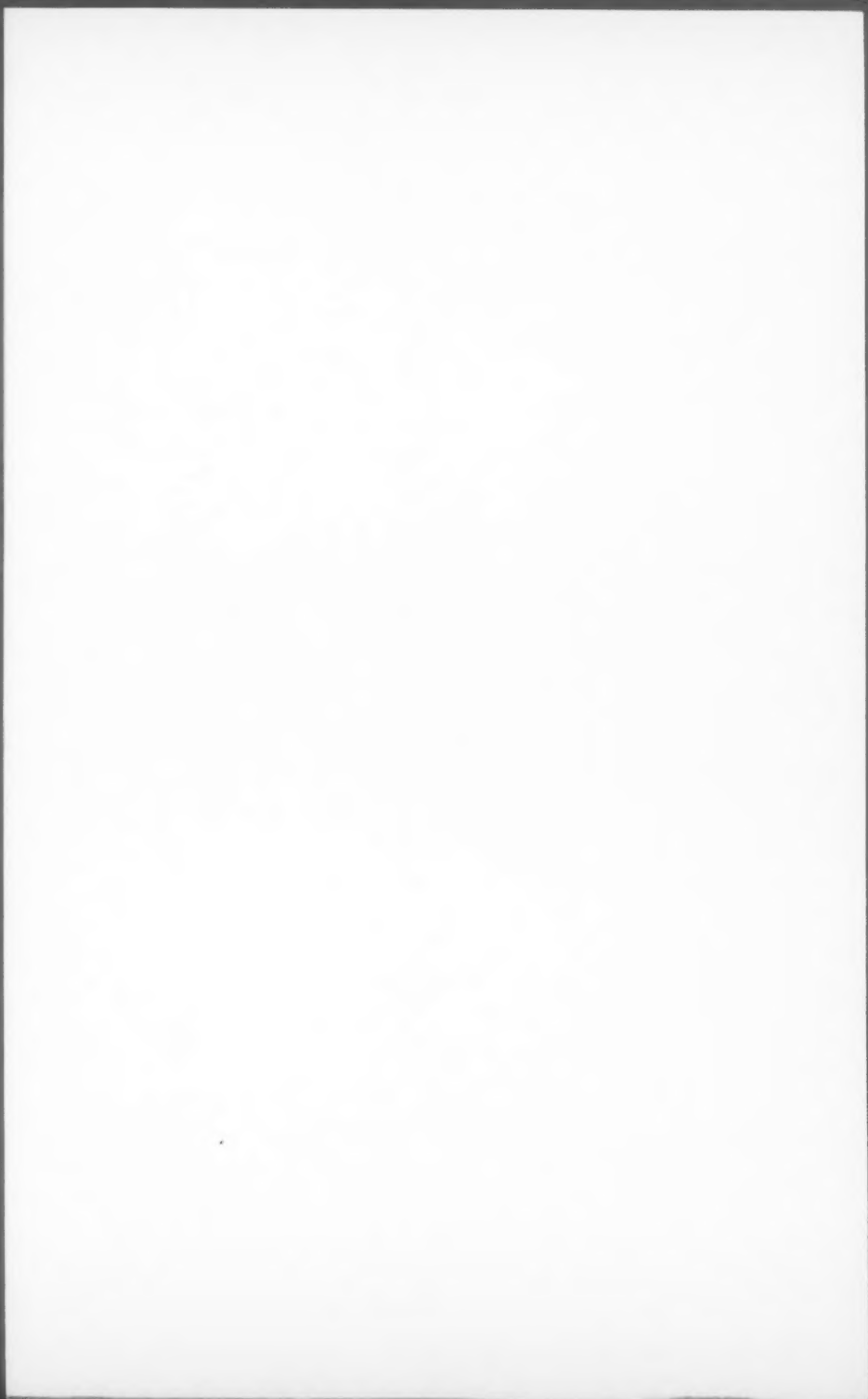
## ABSTRACTED CLASSIFICATION DECISIONS

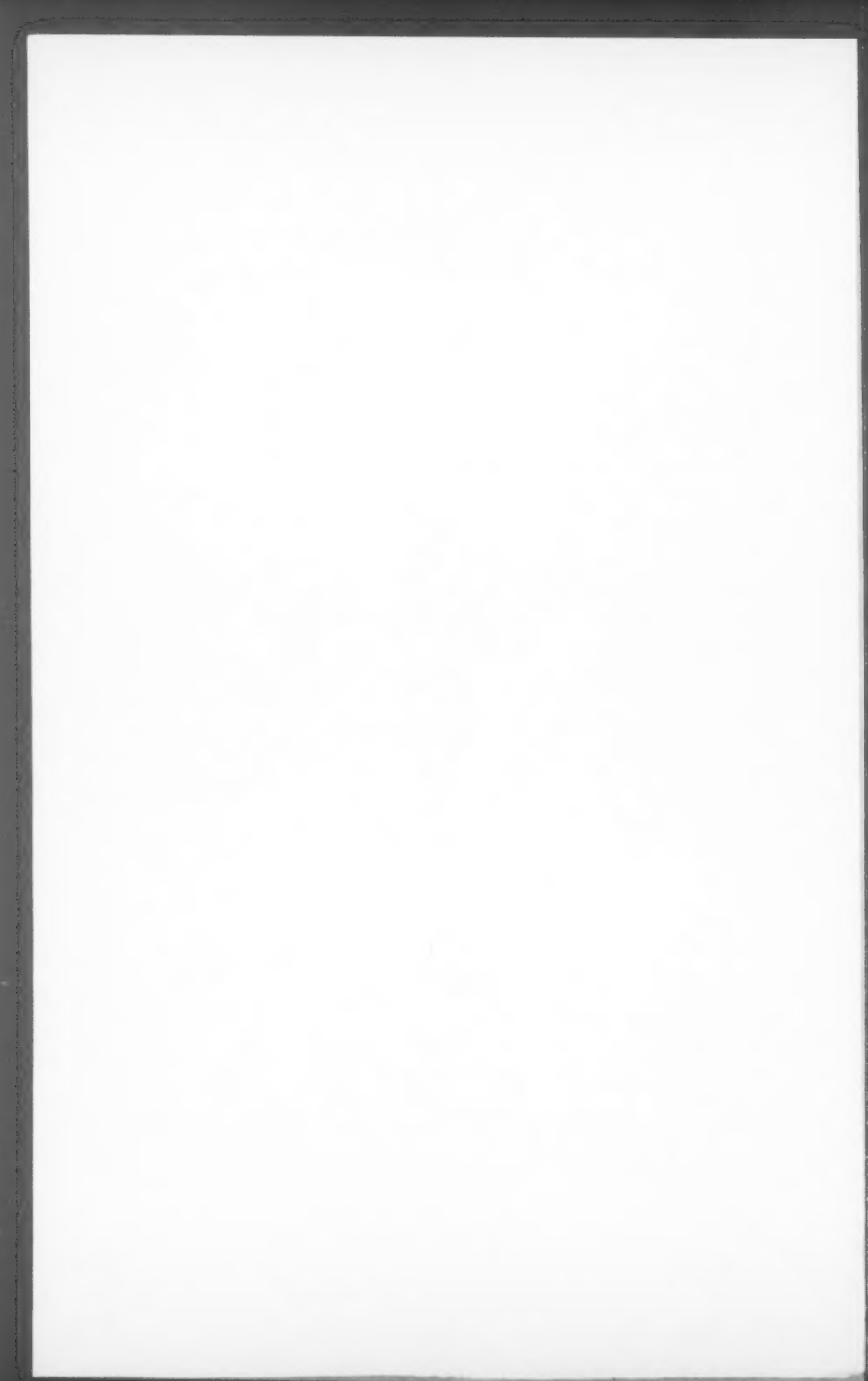
DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C00/1 Aquilino, J 1/24/00	Alcan Aluminum Corp.	94-10-00622	7601.20.90 Free of duty with merchandise processing fee for goods not originating in the territory of Canada	CA7601.20.90 Free of duty at lower merchandise processing fee and entitled to pref- erential treatment under the US-Canada Free Trade Agreement	Free Trade Agreement Alcan Corp. v. U.S., 165 F3d 898 (1999)	Detroit Aluminum in various forms and shapes
C00/2 Aquilino, J 1/24/00	Alcan Aluminum Corp.	94-10-00627	7601.20.90 Free of duty with merchandise processing fee for goods not originating in the territory of Canada	CA7601.20.90 Free of duty at lower merchandise processing fee and entitled to pref- erential treatment under the US-Canada Free Trade Agreement	Alcan Corp. v. U.S., 165 F3d 898 (1999)	Detroit Aluminum in various forms and shapes
C00/3 Aquilino, J 1/24/00	Alcan Aluminum Corp.	94-11-00664	7601.20.90 Free of duty with merchandise processing fee for goods not originating in the territory of Canada	CA7601.20.90 Free of duty at lower merchandise processing fee and entitled to pref- erential treatment under the US-Canada Free Trade Agreement	Alcan Corp. v. U.S., 165 F3d 898 (1999)	Buffalo-Niagara Falls, NY Aluminum in various forms and shapes
C00/4 Carman, C.J. 1/31/00	Dolly, Inc.	93-06-00354	4202.32.3030 20%	3924.10.50 3.4%	Agreed statement of facts	Dayton and Cincinnati Ohio Bottle tote bags

## ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V0001 Peters, J. 2/1/00	Intercargo Insurance Co.	97-03-00363	Transaction value	\$10,000.00 for consumption entry CE G74-0116184-7	Agreed statement of facts	Not stated







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